Supreme Court, U.S.
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IN THE

Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

BRYAN D. COLLINS, *et al.*
and JOHN W. STEWART, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is a defendant's statutory right to removal foreclosed solely because a defense available to both diverse and nondiverse defendants serves as the basis for a finding that the nondiverse party has been fraudulently joined?

2. Where the "common defense" is a procedural defense and not a defense to the merits of the plaintiff's claim, does that common defense preclude a fraudulent joinder analysis and a diverse defendant's right to removal?

PARTIES TO PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit—the court whose judgment is sought to be reviewed—are:

Petitioners in this Court and Defendants/ Appellees in the underlying *Collins* matter: Wyeth f/k/a American Home Products Corporation d/b/a Wyeth Laboratories, Inc.; Wyeth Lederle; Wyeth Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; Aventis Pasteur, Inc., individually and as Successor in Interest to Connaught Laboratories, Inc.; Pasteur Merieux Connaught, Inc.; Baxter International, Inc., individually and as Successor in Interest to North American Vaccine, Inc.; Merck & Co., Inc.; SmithKline Beecham Corporation d/b/a GlaxoSmithKline; BioPort Corporation, Inc.; and Eli Lilly and Company.

Respondents in this Court and Appellants in the underlying *Collins* matter: Bryan D. Collins, as parent and next friend of Zachary W. Collins; Allyson M. Collins, as parent and next friend of Zachary W. Collins; Freddie M. Anderson, as parent and next friend of Robert Thomas-Anderson; Georgia M. Anderson, as parent and next friend of Robert Thomas-Anderson; Herman R. Bernard, as parent and next friend of Reginald L. Bernard; et al.

The following additional Defendants in *Collins* have not joined in the Petition and are being served as Respondents:

American International Chemical, Inc.; B. F. Ascher & Company, Inc.; Bayer Corp.; Bristol-Meyers Squibb Co.; Evans Medical Ltd.; RPK Pharmaceuticals; Dolder; Lisa Stone, M.D., individually and as Successor in Interest to Children's Medical Group, PA; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Byron's Discount Drugs; Jeff Court, M.D., individually and as Successor in Interest to Children's Medical Group, PA; Walter E. Dawkins, M.D.; Louisa Lawson, M.D.; Sartin's Discount Drugs, Inc.; Brian Stretch, M.D.; Julian Lee Owen; Village Pharmacy; John Does; and Children's Medical Group, P.A.

Petitioners in this Court and Defendants/Appellees in the underlying *Stewart* matter: Wyeth Laboratories; Wyeth-Ayerst; Wyeth-Ayerst Laboratories; Wyeth Lederle; Wyeth Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; Aventis Pasteur, Inc., individually and as successor in interest to Connaught Laboratories, Inc.; Pasteur Merieux & Pasteur Merieux Connaught; Baxter International, Inc., individually and as successor in interest to North American Vaccine, Inc.; Merck & Co., Inc.; SmithKline Beecham Corporation d/b/a GlaxoSmithKline; BioPort Corporation, Inc.; and Eli Lilly and Company.

Respondents in this Court and Plaintiffs/Appellants in the underlying *Stewart* matter: John Stewart, III; Annette C. Stewart; Bryan D. Collins; Allyson M. Collins; Herman R. Bernard, Jr.; Carola H. Bernard; Larry Blackwell; Larry Blackwell; Melissa McGrew; Jules J. Cousin, Jr.; Beverly Cousin; John Gamberi; Mark Klinedinst; Laurie Klinedinst; Teri Pitts; Traci Pitts; Kevin Samuel; Victoria Samuel; David G. Underwood; Lauren Underwood; Jeremy Williams; Shawanda Williams.

The following additional Defendants in *Stewart* have not joined in the Petition and are being served as Respondents:

American International Chemical, Inc.; B. F. Ascher & Company, Inc.; Evans Medical, Inc.; Dolder; Bert Bradford, M.D., Gulf Coast Pediatric Clinic; Walter E. Dawkins, M.D.; Owen Lee, M.D., Sartin's Discount Drugs, Inc., Brian Stretch, M.D. d/b/a Street Clinic; Village Pharmacy; John Does 1-200, who are individuals, proprietorships, corporations, or other entities whose names and identities are otherwise unknown to the plaintiffs; Jeffrey Crout, M.D.; Children's Medical Group, PA; RPK Pharmaceuticals.

CORPORATE DISCLOSURE STATEMENT

SmithKline Beecham Corporation

The ultimate parent of SmithKline Beecham Corporation d/b/a GlaxoSmithKline is GlaxoSmithKline plc., which, through its wholly owned subsidiaries, owns 100% of SmithKline Beecham Corporation d/b/a GlaxoSmithKline. To the knowledge of GlaxoSmithKline plc, none of the shareholders of GlaxoSmithKline plc owns 10% or more of its outstanding shares.

Aventis Pasteur Inc.

The parent corporation of Aventis Pasteur Inc. is Life Sciences Holdings Ltd. No publicly held corporation owns 10% or more of the stock of Aventis Pasteur Inc.

Abbott Laboratories, Inc.

Abbott Laboratories has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock or other ownership interest.

Wyeth

Wyeth is a publicly traded corporation with no parent and no other publicly traded corporation owns 10% or more of its stock.

Baxter International, Inc.

Baxter International, Inc. does not have a parent corporation nor does any publicly held company own more than 10% of its stock.

Merck & Co., Inc.

Merck & Co., Inc. has no parent corporation and there is no publicly held corporation that owns 10% or more of its stock or other ownership interest.

BioPort Corporation, Inc.

BioPort Corporation is privately owned and there is no publicly held corporation that owns 10% or more of its stock or other ownership interest.

Eli Lilly and Company

Eli Lilly and Company does not have a parent corporation nor does any publicly held company own more than 10% of its stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners SmithKline Beecham Corporation d/b/a GlaxoSmithKline, Abbott Laboratories, Inc., Aventis Pasteur, Inc., Connaught Laboratories, Pasteur Merieux, Pasteur Merieux Connaught, Baxter International, Inc., individually and as successor in interest to North American Vaccine, Inc., BioPort Corporation, Inc., Merck & Co., Inc., and Wyeth f/k/a American Home Products Corporation ("Vaccine Defendants") and Eli Lilly and Company (collectively referred to as "Petitioners") file this Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The district court's orders are unpublished and were rendered in Civil Action No. 3:01CV97NLN; *Bryan D. Collins, et al. v. American Home Products Corp., et al.*, and Civil Action No. 3:02CV472LN; *John W. Stewart, III, et al. v. American Home Products Corp. et al.*, In the United States District Court for the Southern District of Mississippi, Jackson Division. The district court rendered an order denying remand in each case, *see* App. at 14a and 18a, and subsequently dismissed both cases, *see* App. at 7a and 9a.

The *Collins* and *Stewart* cases were consolidated by the court of appeals. The opinion of the court of appeals was handed down in No. 02-60736 (consolidated with No. 02-60764), *Bryan D. Collins, et al. v. American Home Products Corp. et al.*, in the United States Court of Appeals for the Fifth Circuit. *See* App. at 1a. The court of appeals' opinion was published and is reported as *Collins v. American Home Products Corp.*, 343 F.3d 765 (5th Cir. 2003).

JURISDICTION

The judgment of the Fifth Circuit sought to be reviewed in this case was entered on September 9, 2003. The Vaccine Defendants' timely filed petitions for panel rehearing and rehearing en banc were denied on October 4, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1) to review the court of appeals' decision.

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1332(a) ("The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000 . . . and is between (1) citizens of different states. . . .").

28 U.S.C. § 1441(a) ("[A]ny civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.").

42 U.S.C. § 300aa-11(a)(2)(A) ("No person may bring a civil action for damages . . . arising from a vaccine-related injury or death . . . unless a petition has been filed, in accordance with section 300aa-16 of this title, for compensation under the Program for such injury or death. . . .").

42 U.S.C. § 300aa-11(a)(3) ("No vaccine administrator . . . may be made a party to a civil action (other than a civil action which may be brought under paragraph (2)) for damages for a vaccine-related injury or death associated with the administration of a vaccine. . . .").

STATEMENT OF THE CASE

This case arises from claims asserted by the Plaintiffs, who were plaintiffs in two cases filed in the First Judicial District of Hinds County, Mississippi (the "*Collins*" and "*Stewart*" cases), for injuries allegedly arising out of the administration of vaccines to their minor children. The cases were consolidated on appeal by the Fifth Circuit.

Petitioners, who were defendants in the district court, are the manufacturers and distributors of certain childhood vaccines allegedly administered to the Plaintiffs' children ("Vaccine Defendants") and one of the manufacturers of thimerosal, which was used as a preservative in the vaccines ("Thimerosal Defendants"). The other defendants were the doctors, medical practices, and pharmacies who allegedly manufactured, distributed, and/or administered the vaccines ("Vaccine Administrators"). The Vaccine Administrators are the only defendants that are residents of Mississippi.

Petitioners removed each of the actions in question to the United States District Court for the Southern District of Mississippi, invoking the court's diversity jurisdiction and demonstrating that the only resident defendants had been fraudulently joined. They asserted that the district court lacked subject matter jurisdiction over the claims against the resident defendants by virtue of Plaintiffs' failure to comply with the National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-1 *et seq.* ("Vaccine Act"). Specifically, the uncontroverted facts showed that Plaintiffs had failed to file petitions for compensation with a specially constituted court of special masters within the United States Court of Federal Claims ("Vaccine Court") and thus had not exhausted the statutory compensation remedy provided by the Vaccine Act. That failure to exhaust the Vaccine Act remedy barred

any court from exercising subject matter jurisdiction over the claims against the resident defendants and procedurally precluded all possibility of a recovery here.

> No person may bring a civil action for damages . . . in a State or Federal court for damages arising from a vaccine-related injury or death associated with the administration of a vaccine . . . unless a petition has been filed . . . for compensation under the Program for such injury or death and . . . the United States Court of Federal Claims has issued a judgment . . . on such petition. . . .

42 U.S.C. § 300aa-11(a)(2)(A).

Plaintiffs moved for remand in both cases. They argued in part that their claims were not subject to the Vaccine Act and its jurisdictional bar because they alleged an injury from the thimerosal preservative used in FDA-approved vaccine formulas and that the preservative so used should be classed as an "adulterant" or "contaminant." *See* 42 U.S.C. § 300aa-33(5) (defining "vaccine-related injury" as any "illness, injury, condition, or death associated with" enumerated vaccines, but not conditions "associated with an adulterant or contaminant intentionally added to such a vaccine").

The district court ultimately denied the motions to remand in both the *Collins* and *Stewart* cases, concluding that the Vaccine Act covered Plaintiffs' claims and that their failure to exhaust the Vaccine Act remedy required the court to conclude "that there no longer exists any reasonable possibility that the claims asserted by the plaintiffs against the resident defendants are presently cognizable in any forum other than the [Vaccine Court]." App. at 18a; *see also* App. at 12a.

Having found that the resident defendants were fraudulently joined, the district court dismissed the claims against them in both cases. The court also dismissed the claims against the remaining defendants for failure to exhaust the statutory compensation remedy under the Vaccine Act. *See* App. at 7a and 9a.

Plaintiffs appealed the district court's decisions in both cases, and the appeals were consolidated. In their appeal briefs in each case, Plaintiffs challenged asserted defects in the removals and some aspects of the dismissal order.

The Fifth Circuit heard oral argument on August 6, 2003. The next day, a different panel of the Fifth Circuit issued *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003), *vacated on reh'g en banc*, 355 F.3d 357 (5th Cir. 2003), holding that a district court deciding whether a nondiverse defendant has been fraudulently joined may not resolve that issue in favor of the removing defendant where the basis for the claim of fraudulent joinder is a defense "common" to the diverse and nondiverse defendants alike. *See Smallwood*, 342 F.3d at 407. The majority expressed its view that this Court's decision in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), dictated this result.

On September 9, 2003, the *Collins* panel extended the "common defense" rule announced in *Smallwood* to this case and remanded to the district court with instructions that both *Collins* and *Stewart* be remanded to state court. *Collins v. Am. Home Prods. Corp.*, 343 F.3d 765, 769 (5th Cir. 2003).[1]

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1. The Vaccine Defendants attempted to file a post-submission brief directed to the *Smallwood* issue—which, as noted above, was raised by the Court, *sua sponte*, for the first time at oral argument. Their request for leave to file the supplemental brief was denied.

The Vaccine Defendants filed petitions for panel rehearing and rehearing en banc, demonstrating that, even if the *Smallwood* rule were correct, it could not be extended to a case like this one where the "common defense" was a purely procedural and jurisdictional bar—here, the lack of subject matter jurisdiction under the Vaccine Act. As the Vaccine Defendants pointed out, in such a case, there was no possibility that the fraudulent joinder inquiry would improperly devolve into a merits decision.

The Fifth Circuit voted to rehear *Smallwood* en banc and then granted the Vaccine Defendants' motion to stay the mandate in *Collins* pending the outcome of *Smallwood* (as well as the pending petitions for rehearing in *Collins*). On September 10, 2004, the Fifth Circuit issued its en banc opinion in *Smallwood* holding that the "common defense" rule[2] "applies only in that limited range of cases where the allegation of improper[3] joinder rests only on a showing that there is no reasonable basis for predicting that state law would allow recovery against the in-state defendant ***and that showing is equally dispositive of all defendants***." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004)

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2. The term "common defense rule" was used in the Fifth Circuit's panel opinion, *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003), *vacated on reh'g en banc*, 355 F.3d 357 (5th Cir. 2003), but not in the majority en banc opinion. The first dissenting opinion refers to the "common defense" rule. *See, e.g., Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 583 n.10 (Jolly, J., dissenting).

3. The en banc majority opinion rejected the term "fraudulent" joinder in favor of "improper" joinder. *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d at 571 n.1.

(en banc) (emphasis added). The en banc opinion again relied on *Cockrell*, holding that when the defense providing the basis for fraudulent joinder is common to both resident and non-resident defendants, "there is no improper joinder; there is only a lawsuit lacking in merit." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 576 (5th Cir. 2004) (en banc) (citing *Cockrell*, 232 U.S. 146). The petitions for panel rehearing and rehearing en banc in this matter were then denied. *See* App. at 22a.

The Vaccine Defendants filed another motion to stay the mandate on October 6, 2004. They also filed a letter under FED. R. CIV. P. 28(j) in order to apprise the Fifth Circuit of a contemporaneous decision in *Moss v. Merck & Co.*, holding that Vaccine Act defenses are not applicable to claims against manufacturers of thimerosal. *See Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004). The Vaccine Defendants argued that, by virtue of *Moss*, the purportedly "common defense" of the Vaccine Act was not dispositive of the claims against all defendants, as required by *Smallwood*.[4] The Fifth Circuit denied the Vaccine Defendants' motion to stay the mandate on November 12, 2004. The mandate issued on the same date.

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4. Petitioner Eli Lilly and Company does not join in any argument in this Petition based on *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004).

REASONS FOR GRANTING THE PETITION

The most basic principle of *stare decisis* indicates that this Court should review the decision of the Fifth Circuit here. In rejecting jurisdiction over this case based on a supposed "common defense" rule, the Fifth Circuit has created a direct conflict with other circuits, overturned years of its own precedent, and wholly without justification significantly constrained a defendant's statutory right to removal. Neither the Fifth Circuit's opinion in this case nor its opinion in the *Smallwood* case, providing the decisional rule applied here, offers any basis for implementing such a sea change in federal jurisdictional law.

I. The Origins of the Doctrine of Fraudulent Joinder

The doctrine of fraudulent joinder is firmly rooted in longstanding principles of federal jurisdiction. In the diversity context, the removal statutes are designed by Congress to provide nonresident defendants with a federal forum to litigate state claims in order to protect them from any perceived prejudice or preference of the state court regarding the resident plaintiffs. *See Pease v. Peck*, 59 U.S. 595, 599 (1855) ("The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that, possibly the state tribunal might not be impartial between their own citizens and foreigners."). It is in accordance with this principle that a defendant who is fraudulently joined to preclude federal jurisdiction cannot prevent removal, and that such a resident defendant's citizenship should be disregarded for purposes of determining diversity.[5] Thus, the focus of the

5. *See, e.g., Polyplastics, Inc. v. Transconex, Inc.*, 713 F.2d 875, 877 (1st Cir. 1983) (party fraudulently joined to defeat removal is (cont'd)

fraudulent joinder inquiry is whether a nondiverse party has been added solely to deprive the federal courts of jurisdiction. *See, e.g.*, *Smallwood*, 385 F.3d at 582 (Jolly, J., dissenting) (citing 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c][iv][A] (3d ed. 2004).

To effectuate Congress' intent in providing diversity jurisdiction, the federal courts must protect a defendant's

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(cont'd)
disregarded in determining diversity of citizenship); *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459, 460-61 (2d Cir. 1998) (plaintiff may not defeat defendant's right to removal by fraudulently joining defendants); *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 112 (3d Cir. 1990) (distinguishing case from one where joinder of nondiverse defendants could be disregarded because of no reasonable basis for liability); *Mayes v. Rapoport*, 198 F.3d 457, 461 (4th Cir. 1999) (nondiverse defendants who are fraudulently joined do not preclude removal); *Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 323 (5th Cir. 2001) (removal not precluded by fraudulent joinder of nondiverse party); *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904, 907-09 (6th Cir. 1999) (citizenship of fraudulently joined defendant properly disregarded); *Schwartz v. State Farm Mut. Auto. Ins. Co.*, 174 F.3d 875, 878 (7th Cir. 1999) (citizenship of fraudulently joined defendant is disregarded for purposes of determining diversity); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806, 810-11 (8th Cir. 2003) (nondiverse defendant fraudulently joined in state court action will not defeat removal jurisdiction if there is no reasonable possibility of recovery against that defendant); *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1067 (9th Cir. 2001) (nondiverse defendant properly deemed fraudulently joined and disregarded when plaintiff's complaint failed to state claim for negligent representation against that defendant as matter of state law); *Am. Nat'l Bank & Trust Co. of Sapulpa v. Bic Corp.*, 931 F.2d 1411, 1412 (10th Cir. 1991) (fraudulently joined defendants do not preclude removal); *Triggs v. John Crump Toyota, Inc.*, 154 F.3d 1284, 1287-88 (11th Cir. 1998) (fraudulently joined parties disregarded); *see also* 16 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 107.14[2][c][iv][A] (3d ed. 2004).

statutory right to remove and prevent other parties from subverting this right. This Court has long held the view that in such cases, where it is suggested that a fraud upon the jurisdiction of the federal courts has been committed, "'the Federal courts may, and should, take such action as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.'" *Wecker v. Nat'l Enameling & Stamping Co.*, 204 U.S. 176, 182-83 (1907) (quoting *Ala. Great Southern Ry. Co. v. Thompson*, 200 U.S. 206 (1906)). Further, "the Federal courts should not sanction devices intended to prevent a removal to a Federal court where one has that right, and should be equally vigilant to protect the right to proceed in the Federal courts as to permit the state courts, in proper cases, to retain their own jurisdiction." *Id.* at 186.

Analysis of a fraudulent joinder situation focuses on the resident defendant and whether there is a reasonable possibility of recovery against that party. This Court's jurisprudence does not state that a "common defense" among all defendants precludes finding a fraudulent joinder. With its ruling in *Smallwood* and the extension of the *Smallwood* rule in this case, the Fifth Circuit has placed unprecedented and unprincipled limits on the doctrine of fraudulent joinder based on the mere happenstance that a defense is shared by multiple defendants. This new rule conflicts with the purpose and history of fraudulent joinder and unfairly thwarts congressionally mandated access to federal courts for truly diverse defendants.

II. The *Smallwood* Rule Announced by the Fifth Circuit and Applied in This Case Creates an Unprecedented and Inappropriate Limitation Upon Fraudulent Joinder

A. The *Smallwood* Rule Establishes a New "Common Defense" Inquiry

Relying in part on this Court's decision in *Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146 (1914), for support, the Fifth Circuit recently held:

> [W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant. In such a situation, the entire suit must be remanded to state court.

Smallwood v. Ill. Cent. R.R. Co., 385 F.3d at 571.

Key to its reasoning was the majority's view that, under *Cockrell*, a defense common to both diverse and nondiverse defendants precludes removal based upon fraudulent joinder. In such a situation, "there is no improper joinder; there is only a lawsuit lacking in ***merit***." *Id.* at 574 (emphasis added). The court went on to say:

> In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such—an allegation that, as phrased by the Supreme Court in *Chesapeake & O.R. Co. v. Cockrell*, "the plaintiff's case [is] ill founded as to all the defendants."

Smallwood, 385 F.3d at 574 (citation omitted).

Petitioners do not dispute that a merits-based inquiry is inappropriate at the removal stage. But the majority provided no explanation as to why the presence of a common defense makes a fraudulent joinder inquiry equivalent to an examination of the merits. A fraudulent joinder based on lack of subject matter jurisdiction, for example, would not touch upon the merits of any claim. Yet the Fifth Circuit compounded its misconstruction of federal jurisdictional law in this area by applying the common defense theory here, with facts providing even ***less*** justification for doing so than *Smallwood*, thereby demonstrating the cascading implications of its new and incorrect formulation of jurisdictional law, which will result in huge inefficiencies and the unfair denial of a federal forum to innumerable future defendants.

B. The Traditional Test for Fraudulent Joinder Is Not a Common Defense Inquiry

Contrary to the majority's assertion in *Smallwood*, the traditional test for fraudulent joinder focuses solely on the viability of the claims against the resident defendants. It involves "a simple question and, eschewing personal motives of the plaintiff, applies an objective test to produce a fair answer. . . ." *Smallwood*, 385 F.3d at 577 (Jolly, J., dissenting). Thus, "[w]hen a diverse defendant removes to federal court on grounds of 'fraudulent joinder' the federal court asks only:

> [W]hether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against an in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Id. (quoting majority opinion at 573).

Despite its claim of adherence to the traditional test, the majority in *Smallwood* impermissibly erected a new hurdle to be cleared by the removing defendant:

> [W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant.

Smallwood, 385 F.3d at 571. This new test changes the fraudulent joinder inquiry from one focused on the resident defendant, and whether viable claims have been asserted against that party sufficient to defeat federal jurisdiction, to an assessment of all defendants in relation to the plaintiff's claims. Under *Smallwood*, in any case where a defense establishing fraudulent joinder of the resident defendants is "shared" by the nonresident defendants, the nonresidents cannot invoke their statutory right to removal and have all claims and defenses adjudicated in federal court. A removing defendant may surmount the very high bar of showing the fraudulent joinder of the in-state defendant—and thus complete diversity of the remaining parties—only to have that finding nullified based on the happenstance that the diverse defendant shares a similar defense.

The rule as announced in *Smallwood* is intended to apply even though the plaintiffs have ***no*** ability to recover in state court against the in-state defendants. The *Smallwood* opinion utterly fails to explain how the common defense rule satisfies the purpose of the fraudulent joinder inquiry—*i.e.*, whether a resident defendant has been joined solely to defeat diversity. Considering the lack of ancestry or principled basis for this illogical outcome, the *Smallwood* rule should be reviewed by this Court to determine whether it presents an unsuitable and unnecessary obstacle to a defendant's rights under the removal statute.

C. *Cockrell* Does Not Require, or Even Support, the Common Defense Theory of the Fifth Circuit

More troubling in some ways than the new rule announced in *Smallwood* was the majority's insistence that it was not in fact creating a new fraudulent joinder test at all, but merely restating longstanding existing law which it bolstered by its reference to this Court's decision in *Cockrell*. *See Smallwood*, 385 F.3d at 574. But a careful reading of this Court's decision reveals that the Fifth Circuit has engaged in an unwarranted extension of *Cockrell* in crafting a common defense rule and especially in applying it to cases like this one.

In *Cockrell*, the railroad defendant removed a case to federal court on improper joinder grounds. The basis for its claim of improper joinder was that the plaintiff's entire negligence case (against both the nondiverse engineer and fireman and the diverse railroad) was "false and untrue." As "no negligent act or omission personal to the railway company was charged," the claim of improper joinder of the in-state employees "manifestly ***went to the merits of the action as an entirety*** and not to the joinder; that is to say, it indicated that the plaintiff's case was ill founded as to all the defendants." *Id.* at 153 (emphasis added).

Rather than announcing an additional hurdle for the removing defendant to overcome, this language from *Cockrell* is a traditional application of the fraudulent joinder test. Evaluation of the chances of success of the railroad's stated defense (a lack of negligence) unquestionably would have required an impermissible trial on the merits in the context of a removal proceeding, thus requiring a remand under the traditional test. Because of the merits-based nature

of the defense, the claim against the in-state defendants in *Cockrell* had a possibility of prevailing under state law. To derive a "common defense" rule from this language in *Cockrell* requires a reading completely out of context. The presence of a "common defense" played no part in this Court's holding that the removal analysis had impermissibly crossed the line into a merits inquiry in *Cockrell*. *See Smallwood*, 285 F.3d at 279-80 (Jolly, J., dissenting).

Further, the nature of the defense at issue in *Cockrell* demonstrates the disconnect from this Court's holding to a common defense rule. *Cockrell* involved vicarious liability —the source of the railroad's liability was the allegedly negligent conduct of its employees. *Cockrell*, 232 U.S. at 153. Thus, a finding that the employees had been fraudulently joined based on an absence of negligence on their part would have absolved the railroad company of any liability. As a result, the railroad company and the employees did not share a "common" defense, but instead, precisely the same grounds for liability. *See Smallwood*, 385 F.3d at 580 (Jolly, J., dissenting).

> In short, the entire suit was solely *founded* (or 'ill-founded') on the conduct of the in-state defendants; . . . Indeed, but for their conduct the railroad would not have been in the suit; the in-state defendants could not possibly have been fraudulently joined because their conduct was the *only* actionable conduct in the case. . . .

(emphasis in original). The vicarious nature of the railroad's liability played a critical role in the holding so heavily relied

on by the *Smallwood* majority,[6] yet the majority failed to account for this key element of the "defense" in its analysis of *Cockrell*. In these crucial regards, the *Smallwood* majority stretched the *Cockrell* holding far beyond its particular context in order to formulate a rule much broader than warranted by *Cockrell*.

D. The *Smallwood* Rule Is Unworkable

Beyond the legal ramifications spawned by the *Smallwood* rule, the Court should also consider the practical consequences that the district courts of this country will face if *Smallwood* is permitted to stand. As one of the dissents aptly pointed out, a federal district court will be required to engage in a full-blown traditional fraudulent joinder analysis focused upon the resident defendant, and then, if and only if the court concludes that the resident defendant has been fraudulently joined, will it consider whether the grounds for that improper joinder overlap with defenses that might be asserted by the other defendants. And if there is any coincidence of defense, then the case must be remanded, irrespective of the finding that the plaintiff cannot recover against the in-state defendant. *E.g.*, *Smallwood*, 385 F.3d at 579 (Jolly, J., dissenting).

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6. The language from *Cockrell* demonstrates its importance:

> As no negligent act or omission personal to the railway company was charged and its liability, like that of the two employees, was, in effect, predicated upon the alleged negligence of the latter, the showing manifestly went to the merits of the action as an entirety and not to the joinder. . . .

Cockrell, 232 U.S. at 153.

Although the *Smallwood* majority made clear that the question is one of joinder, not merits, the majority's theory will paradoxically require a federal district court to "look beyond the joinder of the nondiverse defendant to determine the defenses of the diverse defendant as well." 385 F.3d at 582 (Jolly, J., dissenting); *see also id.* at 588 (Smith, J., dissenting) (quoting same). Thus, the majority adds analytical layers to what was formerly a relatively straightforward fraudulent joinder inquiry and more detrimentally, leaves district courts effectively without guidance in navigating the obscure lines between *Smallwood*-sanctioned joinder review and impermissible merits inquiry. The Court is requested to examine both the stated bases for the rule, as well as the far-reaching implications it will have on the federal courts.

E. This Case Involves a Non-Merits Defense

Cockrell does not in any way support the remand of a case involving a purely procedural, non-merits defense, as is at issue here. *Smallwood* does not purport to apply to non-merits defenses even where they are shared by the defendants; the opinion repeatedly stressed that the improper joinder inquiry should focus on the joinder, not the merits. The issue in this case also concerns jurisdiction and joinder—not the merits of the Plaintiffs' claims.

The exhaustion requirement of the Vaccine Act, 42 U.S.C. § 300aa-11(a)(2), is not a defense even remotely touching on the merits of the Plaintiffs' claims. This tort-suit ban does not abolish Plaintiffs' civil action for claims arising from alleged vaccine related injuries, but rather suspends jurisdiction over them until the Vaccine Act's statutory prerequisites have been exhausted. 42 U.S.C. § 300aa-11(a)(2)(A). By statute, if a claim for vaccine-related injury is prematurely filed in any state or federal court, that

court "shall dismiss" it. *Id.* § 300aa-11(a)(2)(B). If there were any doubt about Congress' intent, the Act expressly precludes a vaccine manufacturer or administrator from being joined to any tort suit prior to exhaustion of the compensation remedy in Vaccine Court. *Id.* at § 300aa-11(a)(3).[7]

The Vaccine Act's tort-suit ban is purely a matter of joinder and jurisdiction—not a defense going to the merits of the Plaintiffs' claim. By recognizing that failure to exhaust the Vaccine Act remedy precluded all possibility of recovery against the resident defendants, the district court simply enforced a federally mandated limitation on its subject matter jurisdiction. Because the court below was applying the Vaccine Act according to its express and unequivocal terms to reach this jurisdictional conclusion, there is no danger that the district court impermissibly converted its fraudulent joinder/removal analysis into a decision on the merits of the Plaintiffs' entire action.

In this important regard, the important "principles of comity and federalism" on which the *Smallwood* majority rested its foundation are not transgressed when the impediment to bringing claims against the resident defendant is purely procedural. The very purpose of narrowly construing removal jurisdiction is to prevent an affront to "the dignity of the state courts":

> Most essentially, federal and state courts are ***complementary systems for administering justice***

7. In this provision, Congress intended to "prohibit[] the act—by impleader, cross-claim, or separate suit ***or any other practice***—of making a vaccine manufacturer a party to any civil action brought by a person [allegedly injured by a vaccine after the effective date of the legislation] . . . before that person has completed a compensation proceeding." H.R. Rep. No. 99-908, at 14, *reprinted in* 1986 U.S.C.C.A.N. 6344, 6355 (emphasis added).

> ***in our Nation***. Cooperation and comity, not competition and conflict, are essential to the federal design. A State's dignitary interest bears consideration when a district court exercises discretion in a case of this order [by deciding issues other than subject matter jurisdiction first]. . . . "'Our Federalism' does not mean blind deference to 'States' Rights' any more than it means centralization of control over every important issue in our National Government and its courts. The Framers rejected both these courses. ***What the concept does represent is a system in which there is sensitivity to the legitimate interests of both State and National Governments***."

Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 586 (1999) (quoting *Younger v. Harris*, 401 U.S. 37, 44 (1971) (emphasis added) (internal citations and quotations omitted)). Here, the state courts have no legitimate interests in hearing civil actions arising from claims not exhausted in Vaccine Court. By law, they lack jurisdiction to do anything but dismiss them. 42 U.S.C. § 300aa-11(a)(2)(B). The federal court has precisely the same jurisdictional problem—and the same attendant duty to dismiss—as a state court would have. *See Vt. Agency of Natural Res. v. U.S. ex rel. Stevens*, 529 U.S. 765, 778-79 (2000) ("'Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'" (quoting *Ex parte McCardle*, 74 U.S. 506 (1868)).

Under such circumstances, the common defense rule induces an illogical, improper, and judicially wasteful result—*i.e.*, remand to a court that is equally lacking in

jurisdiction, one that itself lacks the power to do anything but dismiss the action. *See, e.g., Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir. 1990) ("Were the state action remanded, the Louisiana courts would be bound by our ruling that defendants had insufficient contacts with Louisiana to satisfy the federal due process clause requisites for personal jurisdiction. A remand thus would be a futile gesture, wasteful of scarce judicial resources, an exercise in which we decline to engage."); *Bell v. City of Kellogg*, 922 F.2d 1418, 1424-25 (9th Cir. 1991) ("Where . . . remand to state court would be futile, . . . the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources."). The common defense rule by the court of appeals replaces the formerly precise, tailored inquiry with a blunt instrument, ill-suited in all circumstances to properly determine whether a resident defendant has been fraudulently joined.[8]

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8. Even if the *Smallwood* "common defense" rule were correct, the Fifth Circuit's own decisions show that it should never have been applied in this case for an additional reason. In *Smallwood*, the en banc Court emphasized that the improper joinder cannot be predicated upon a defense that applies to all defendants. *See, e.g., Smallwood*, 385 F.3d at 571 ("[W]hen a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant."). The converse of this proposition is that the "common defense" rule does not preclude a finding of improper joinder when the defense is inapplicable to some of the defendants, as is the case here. In *Moss v. Merck & Co.*, the Fifth Circuit held that manufacturers of the vaccine preservative thimerosal are not "vaccine manufacturer[s]" entitled to the protections of the Vaccine Act. *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004). Petitioner Eli Lilly and Company does not join in any argument in this Petition based on *Moss*.

(cont'd)

III. An Inter-Circuit Split Exists That Requires Resolution by This Court

The "common defense rule" applied by the Fifth Circuit in *Smallwood* and this case first originated in the Third Circuit in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990).[9] In *Boyer*, the Third Circuit invoked *Cockrell*, and held that "where there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination

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(cont'd)

The *Moss* decision concluded that the Vaccine Act only applies to vaccine-related lawsuits brought against a "vaccine administrator or manufacturer." *Id.* at 503. The Fifth Circuit thus held that the Vaccine Act is not applicable to claims against the Thimerosal Defendants. The *Moss* and *Smallwood* decisions, read together, mean that the common defense rule cannot apply in the present cases because the Vaccine Act defenses available to the Vaccine Defendants and the Vaccine Administrators are not common defenses that are equally dispositive of the claims against the Thimerosal Defendants. The rule, therefore, should have not been applied in this case. Neither the *Moss* decision nor the en banc Court's significant narrowing of the "common defense" rule in *Smallwood* was available to or considered by the panel that decided this case. Those decisions were issued many months after the September 2003 panel decision at issue here. Thus, even if the *Smallwood* "common defense" rule is not rejected by this Court, its application in this case was improper, and certiorari should be granted to establish the proper contours of this new restriction on federal court jurisdiction.

9. "Since *Cockrell* was decided in 1914, the only circuit court decision that, previous to today, has interpreted it as proclaiming a 'common-defense' exception to the fraudulent joinder rule is the Third Circuit's opinion in *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108 (3d Cir. 1990)." *Smallwood*, 385 F.3d at 580 (Jolly, J., dissenting)

which must be made by the state court." *Boyer*, 913 F.2d at 113 (emphasis added).

Eight years later, the Ninth Circuit decided *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998).[10] There, the Ninth Circuit held that a district court can apply a procedural bar to find a defendant fraudulently joined—even though the same procedural bar is equally applicable to the claims against other defendants. In *Ritchey*, as here, the diverse defendant argued that the nondiverse defendants were fraudulently joined because the plaintiff's claims against ***all defendants*** were barred by the statute of limitations. Despite the applicability of that procedural defense to all defendants, the Ninth Circuit affirmed the denial of remand, emphasizing that the limitations defense was "a kind of ***procedural bar, and not one which relates to the merits of the case.***" *Ritchey*, 139 F.3d at 1319 (emphasis added).

Cognizant of the *Cockrell* decision, the Ninth Circuit emphasized the procedural nature of the statute of limitations bar and explained the defense as follows:

> It is one that does not truly go to the merits of the plaintiff's claim in any sense. It does not assert some excuse or justification for what the defendant is alleged to have done, nor does it assert any release or waiver of any right of action against the defendant. It does not even deny the wrong or claim contributory fault or set off.

Id.; *see also LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680, 691-92 (7th Cir. 1998) (predicating finding of fraudulent joinder on statute of limitations defense that applied to all potential defendants).

10. The *Smallwood* majority acknowledged that *Ritchey* was not concordant with its decision. *See Smallwood*, 385 F.3d at 575 n.21.

The decision in this case has created a split of authority between the Fifth[11] and Ninth Circuits (as well as an implied split with the Seventh)[12] because in this case, the Fifth Circuit has applied the "common defense" rule to preclude a fraudulent joinder analysis in circumstances involving only a purely procedural, non-merits based, defense. In so doing, the Fifth Circuit has created a split of authority among the circuits which requires resolution by this Court.

11. Prior to its decision in *Smallwood*, the Fifth Circuit had uniformly applied a two-pronged test for determining whether a party had been fraudulently joined, requiring that the removing party establish (1) actual fraud in the pleading of jurisdictional facts, or (2) inability of the plaintiff to establish a cause of action against the nondiverse party in state court. *See, e.g., Travis v. Irby*, 326 F.3d 644, 647 (5th Cir. 2003); *Ross v. CitiFinancial, Inc.*, 344 F.3d 458, 461 (5th Cir. 2003); *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 311-12 (5th Cir. 2002); *Heritage Bank v. Redcom Labs., Inc.*, 250 F.3d 319, 323 (5th Cir. 2001); *Griggs v. State Farm Lloyds*, 181 F.3d 694, 698-99 (5th Cir. 1999); *Rodriguez v. Sabatino*, 120 F.3d 589, 591 (5th Cir. 1997); *Burden v. Gen. Dynamics Corp.*, 60 F.3d 213, 217 (5th Cir. 1995); *Cavallini v. State Farm Mut. Auto Ins. Co.*, 44 F.3d 256, 259 (5th Cir. 1995); *Laughlin v. Prudential Ins. Co.*, 882 F.2d 187, 190 (5th Cir. 1989); *Tedder v. F.M.C. Corp.*, 590 F.2d 115, 117 (5th Cir. 1979); *Parks v. N.Y. Times Co.*, 308 F.2d 474, 478 (5th Cir. 1962). At least three of these opinions, by their facts, implicitly but specifically rejected the common defense theory by affirming a finding of fraudulent joinder where a "common defense" was present. *See Ross*, 344 F.3d at 463, 467 (fraudulent joinder affirmed in presence of common defense of statute of limitations); *Great Plains*, 313 F.3d at 318 (district court properly granted judgment on the pleadings dismissing plaintiffs' claim against all defendants for negligent misrepresentation); *Rodriguez*, 120 F.3d at 591-92 (affirming fraudulent joinder finding based on lack of duty owed by nondiverse defendant; diverse defendant identically situated for purposes of negligence claim).

12. The *LeBlang* case did not specifically discuss the common defense issue, but its holding that the same defense could provide the basis for a finding of fraudulent joinder is clearly in conflict with the *Smallwood* rule.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED SEPTEMBER 9, 2003

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 02-60736, Consolidated With No. 02-60764

02-60736

Bryan D. Collins, as parent and next friend of Zachary W. Collins; Allyson M. Collins, as parent and next friend of Zachary W. Collins; Freddie M. Anderson, as parent and next friend of Robert Thomas-Anderson; Georgia M. Anderson, as parent and next friend of Robert Thomas-Anderson; Herman R. Bernard, as parent and next friend of Reginald L. Bernard; et al.,

Plaintiffs-Appellants,

v.

American Home Products Corporation, doing business as Wyeth Laboratories Inc.; Wyeth Lederle; Wyether Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; American International Chemical Inc.; Aventis Pasteur Inc., Individually and as Successor in Interest to Connaught Laboratories Inc.; Pasteur Merieux Connaught Inc.; B.F. Ascher & Company Inc.; Baxter International Inc., Individually and as Successor in Interest to North American Vaccine Inc.; Bayer Corporation; Bioport Corporation Inc.; Bristol-Myers Squibb and Company; Evans Medical Ltd.; Merck and Company Inc.; RPK Pharmaceuticals; Dolder;

Appendix A

Eli Lilly & Company; Smithkline Beecham Corporation; Lisa Stone, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Byron's Discount Drugs; Jeff Court, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Walter E. Dawkins, M.D.; Louisa Lawson, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, M.D.; Julian Lee Owen, M.D.; Village Pharmacy; John Does; Children's Medical Group P.A.,

Defendants-Appellees.

02-60764

John W. Stewart, III; Annette C. Stewart; Bryan D. Collins; Allyson M. Collins; Herman R. Bernard, Jr.; Carola H. Bernard; Larry D. Blackwell; Melissa L. McGrew; Jules J. Cousin, Jr.; Beverly L. Cousin; John A. Gamberi; Connie J. Gamberi; Mar' A. Klinedinst; Laurie E. Klinedinst; Terri M. Pitts; Tracy L. Pitts; Kevin T. Samuel; Victoria Samuel; David G. Underwood; Lauren Underwood; Jeremy Williams; Shawanda R. Williams,

Plaintiff-Appellants,

v.

American Home Products Corporation, doing business as Wyeth; Wyeth Laboratories; Wyeth-Ayerst; Wyeth-Ayerst Laboratories; Wyeth Lederle; Wyther Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories Inc.; American International Chemical Inc.;

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Aventis Pasteur Inc., individually and as successor in interest to Connaught Laboratories Inc.; Pasteur Merieux & Pasteur Merieux Connaught; B.F. Ascher & Company Inc.; Baxter International Inc., individually and as successor in interest to North American Vaccine Inc.; Bioport Corporation Inc.; Evans Medical Limited; Dolder; Eli Lilly & Company; Merck and Company Inc.; Smithkline Beecham Corporation; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Walter E. Dawkins, M.D.; Owen J. Lee, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, M.D., doing business as The Street Clinic; Village Pharmacy LLC; Wyeth; John Does, 1-200, who are individuals, proprietorships, corporations, or other entities whose names and identities are otherwise unknown to the plaintiffs; Jeffrey Crout, M.D.; Children's Medical Group P.A.; RPK Pharmaceuticals Inc.,

Defendants-Appellees.

JUDGES: Before EMILIO M. GARZA and DENNIS, Circuit Judges, and DUPLANTIER*, District Judge.

OPINION BY: EMILIO M. GARZA

EMILIO M. GARZA, Circuit Judge:

The plaintiffs in two products liability actions, all of whom are Mississippi residents, appeal the district court's denial of their motions to remand and dismissal of their state law claims against a variety of Mississippi resident and non-

* Senior District Judge of the Eastern District of Louisiana, sitting by designation

resident defendants. Among the defendants are manufacturers of certain childhood vaccines containing the preservative thimerosal, pharmacies who dispensed those vaccines, and physicians who prescribed them.

In *Collins v. American Home Products Corporation,* the plaintiffs brought claims on behalf of their minor children seeking to recover for injuries allegedly suffered by the children as a result of vaccinations containing thimerosal. In *Stewart v. American Home Products Corporation,* many of the same plaintiffs brought claims on their own behalf to recover for expenses and other injuries they allegedly incurred as the parents of injured children. The district court concluded that the Mississippi defendants had been fraudulently joined and that the claims against the remaining defendants must be dismissed because the plaintiffs had failed to comply with the National Childhood Vaccine Injury Act of 1986, *42 U.S.C. § 300aa-1 et seq.*

"[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level." *Ruhrgas AG v. Marathon Oil Co., 526 U.S. 574, 583, 143 L.Ed.2d 760, 119 S.Ct. 1563 (1999).* In a recent opinion, this Court applied the following holding from the Third Circuit's decision in *Boyer v. Snap-On Tools Corporation, 913 F.2d 108 (3d Cir.1990)*:

> [W]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court.

Appendix A

*Smallwood v. Ill. Cent. R.R. Co., 342 F.3d 400, 2003 U.S. App. LEXIS 16181, No. 02-60782, __ F.3d __ , 2003 WL 21805636, at *3 (5th Cir. Aug. 7, 2003)* (quoting *Boyer, 913 F.2d at 113*) (alteration in original).

Here, the defendants successfully convinced the district court to rule on a common defense under the pretense of determining whether the Mississippi defendants had been fraudulently joined. As we stated in *Smallwood,* "[t]his use of fraudulent joinder frustrates the overarching principle of the well-pleaded complaint rule, that state courts are equally competent to decide federal defenses." *2003 U.S. App. LEXIS 16181, [WL] at *5*; *see also 2003 U.S. App. LEXIS 16181, [WL] at *4 n.35* (citing *Cheskiewicz ex rel. Cheskiewicz v. Aventis Pasteur, Inc., 2002 U.S. Dist. LEXIS 15339, No. 02-3583, 2002 WL 1880524, at *3 (E.D. Pa. Aug. 15, 2002)* (unpublished)).[1]

Accordingly, we VACATE the dismissal of the plaintiffs' claims and REMAND with instructions that both cases be remanded to the state court from which they were removed.

---

1. On appeal, the defendants argue that the district court's fraudulent joinder determination in *Stewart* was correct for the additional reason that the plaintiffs' claims fail under Mississippi law. Although it appears that Mississippi's learned intermediary doctrine bars the plaintiffs' claims against the non-diverse pharmacy defendants, *Moore ex rel. Moore v. Mem'l Hosp. of Gulfport, 825 So.2d 658, 664-66 (Miss. 2002)*, this defense does not preclude the possibility of relief against the other non-diverse defendants. Because the remaining defenses apply equally to the claims asserted against the diverse and non-diverse defendants, those defenses cannot, under *Smallwood,* serve as the basis for a finding of fraudulent joinder. Accordingly, we lack subject matter jurisdiction to address the merits of the plaintiffs' claims.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 2, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:01CV979LN

BRYAN D. COLLINS AND ALLYSON M. COLLINS, PARENTS AND NEXT FRIEND OF ZACHARY W. COLLINS, ET AL.

PLAINTIFFS

vs.

AMERICAN HOME PRODUCTS CORPORATION D/B/A WYETH, ET AL.

DEFENDANTS

ORDER

This cause is before the court on the motions of several defendants to dismiss. The court has considered the motions and concludes that they are well taken and should be granted. By their complaint in this cause, each plaintiff herein seeks recovery for more than $1,000 in damages on amount of "vaccine-related injuries" and yet none has first filed a petition for compensation with the Court of Federal Claims, as required by the National Childhood Vaccine Injury Act.

Accordingly, in keeping with the explicit directive of the Vaccine Act, 42 U.S.C. §§ 300aa-1, this cause must be dismissed. *See* 42 U.S.C. § 300aa-11(a)(2)(A) (providing that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vacine-related injury or death . . . unless a petition has been filed" first in the Court of Federal Claims); 42 U.S.C. § 300aa-11(a)(2)(B) (stating that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action"). *See also Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S. Ct. 1477, 1478, 131 L. Ed. 2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

Based on the foregoing, it is ordered that the motions of the defendants to dismiss are granted, and it is therefore ordered that this cause is dismissed without prejudice.

SO ORDERED this 2nd day of August, 2002.

s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 2, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:02CV427LN

JOHN W. STEWART III AND
ANNETTE C. STEWART, ET AL.

PLAINTIFFS

VS.

AMERICAN HOME PRODUCTS CORPORATION
D/B/A WYETH, WYETH LABORATORIES, ET AL.

DEFENDANTS

ORDER

This cause is before the court on the motions of several defendants to dismiss. The court has considered the motions and concludes that they are well taken and should be granted. By their complaint in this cause, each plaintiff herein seeks recovery for more than $1,000 in damages on amount of "vaccine-related injuries" and yet none has first filed a petition for compensation with the Court of Federal Claims, as required by the National Childhood Vaccine Injury Act. Accordingly, in keeping with the explicit directive of the

Appendix C

Vaccine Act, 42 U.S.C. §§ 300aa-1, this cause must be dismissed. *See* 42 U.S.C. § 300aa-11(a)(2)(A) (providing that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vacine-related injury or death . . . unless a petition has been filed" first in the Court of Federal Claims); 42 U.S.C. § 300aa-11(a)(2)(B) (stating that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action"). *See also Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S. Ct. 1477, 1478, 131 L. Ed. 2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

Based on the foregoing, it is ordered that the motions of the defendants to dismiss are granted, and it is therefore ordered that this cause is dismissed without prejudice.

SO ORDERED this 2nd day of August, 2002.

s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 1, 2002

UNITED STATES DISTRICT COURT
S.D. MISSISSIPPI, JACKSON DIVISION

No. Civ.A. 3:02CV427LN

John W. STEWART III and Annette C. Stewart, et al.

Plaintiffs

v.

AMERICAN HOME PRODUCTS CORPORATION d/b/a Wyeth, Wyeth Laboratories, et al.

Defendants

Aug. 1, 2002

MEMORANDUM OPINION AND ORDER

LEE, J.

This cause is before the court on plaintiffs' motion to remand. Defendants have responded in opposition, and the court, having considered the memoranda of authorities, together with attachments, submitted by the parties, concludes that plaintiffs' motion to remand is due to be denied.

Appendix D

The plaintiffs in this case are the parents of children who are alleged to have suffered injuries as a result of their having received one or more childhood vaccines containing a preservative known as thimerosal. In a companion case, *Collins, et al. v. American Home Products Corp., et al.,* Civil Action No. 3:01CV979LN, these same plaintiffs sued in their capacity as parents and next friends of their respective children, seeking to recover damages for their children's injuries alleged to have been caused by the thimerosal-containing vaccines,. In this case, these same plaintiffs seek to recover medical expenses incurred by them and reasonably expected to be incurred by them in the future on account of their children's injuries, as well as damages for their own emotional distress alleged to have proximately resulted from their children's injuries.

The *Collins* case, like the present case, was originally filed in the Circuit Court of Hinds County, and was removed to this court by the nonresident defendants. In *Collins,* this court, after initially concluding in a memorandum opinion and order dated June 21, 2001, that it lacked either federal question jurisdiction or jurisdiction based on diversity of citizenship, concluded upon reconsideration that there was diversity jurisdiction, as there was no reasonable possibility that the plaintiffs could establish a basis for recovery against the resident defendants. The court then dismissed the case since all the plaintiffs' claims were barred by the National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1.[1]

1. The Vaccine Act provides that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vaccine-related injury or (cont'd)

The question is whether that same result should occur here; and in the court's opinion it should, for just as these plaintiffs had no cognizable claims against the resident defendants in *Collins,* they have no cognizable claims of their own against the resident defendants.

As respects the ultimate source of their alleged right of recovery, plaintiffs' claims in this case are the same as their claims as parents and next friends in *Collins,* namely, that their children have been harmed from exposure to mercury contained in thimerosal, which was used as a preservative in vaccines administered to their children.[2] All that distinguishes this case from *Collins* is the fact that the plaintiffs herein purport to seek recovery in their own right, and not on behalf of their children, of medical expenses incurred for their children, and that they seek to recover damages for their own emotional distress. So far as the propriety of removal goes,

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(cont'd)

death . . . unless a petition has been filed" first in the Court of Federal Claims, and mandates that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action." 42 U.S.C. § 300aa-11(a); *see also Shalala v. Whitecotton,* 514 U.S. 268, 270, 115 S.Ct. 1477, 1478, 131 L.Ed.2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

2. As in *Collins,* the plaintiffs in this case have alluded to over-the-counter products; but it is plain that they have traced their children's injuries to having been injected with thimerosal-containing vaccines.

however, these distinctions are immaterial, for plaintiffs have no cognizable claim for these alleged damages.

First, plaintiffs' claim for medical expenses is barred by the Vaccine Act to the same extent as their claim in *Collins* to recover such expenses in their capacity as representatives of their respective children. Under the Vaccine Act, a petition for compensation may be brought by "any person who has sustained a vaccine-related injury [or] *the legal representative of such person if such person is a minor* or is disabled. . . ." 42 U.S.C. § 300aa-11(b)(1)(A) (emphasis added). The Act further provides that compensation "shall include" medical and remedial expenses incurred "by or on behalf of" the injured person. *See* 42 U.S.C. § 300aa-15(a). Thus, plaintiffs cannot avoid applicability of the Vaccine Act, and the Act's tort suit ban, merely by suing in their own name for costs that are compensable under the Act. *See Shafer v. American Cyanamid Co.*, 20 F.3d 1, 5 (1st Cir.1994) (stating that "if [the plaintiff] cannot file a petition with the Vaccine Court, the Act says a tort suit does not apply to him," but if he can file such a petition, then the tort suit ban does apply).[3]

Moreover, as defendants correctly argue, Mississippi law does not recognize a claim for emotional distress damages

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3. The court agrees with defendants that plaintiffs would be precluded from suing for these costs in any event since they have already sued in *Collins* for these same damages on behalf of their respective children. *See Lane v. Webb*, 220 So.2d 281, 285 (Miss. 1969) (holding that "where the father . . . brings a suit as next friend of his minor child, he waives on the child's favor his right to recover the expenses of hospital treatment, and is thereafter estopped to claim them in a separate suit.").

on behalf of parents for injuries alleged to have resulted in the manner charged by plaintiffs herein. *Cf. Downtown Grill, Inc. v. Connell,* 721 So.2d 1113, 1122 (Miss.1989) (stating, "If this Court is unwilling to allow parents to recover damages for the severe personal injury of their child, we certainly will not allow recovery of damages by a parent for the alleged malicious prosecution of one's minor child.") (citing *Butler v. Chrestman,* 264 So.2d 812, 817 (Miss.1972), and *Fowler Butane Gas Co. v. Varner,* 244 Miss. 130, 156, 141 So.2d 226, 236 (1962)), in which the court stated that "'. . . if a minor sustains personal injuries under such circumstances of wilfulness, aggravation, or oppression as to justify an imposition of exemplary or punitive damages, upon the wrongdoer, the right of recovery thereof is in the child, and that there can be no recovery of the item by the parent in his own right.' It is also said: . . . that the measure of damages in a parent's action for injuries to a minor child, other than a case of seduction, is the actual damage which the plaintiff has suffered . . .'").

Accordingly, for the same reason this court ultimately denied plaintiffs' motion to remand in *Collins,* the court herein concludes that plaintiffs' motion to remand should be denied.

It is therefore ordered that plaintiffs' motion to remand is denied.

APPENDIX E — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI, JACKSON DIVISION DATED AUGUST 1, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
JACKSON DIVISION

CIVIL ACTION NO. 3:01CV979LN

BRYAN D. COLLINS AND ALLYSON M. COLLINS, PARENTS AND NEXT FRIEND OF A ZACHARY W. COLLINS, ET AL.

PLAINTIFFS

VS.

AMERICAN HOME PRODUCTS CORPORATION D/B/A WYETH, ET AL.

DEFENDANTS

ORDER

This cause is before the court on the motion of defendants American Home Products Corporation, Abbott Laboratories, Inc., Aventis Pasteur, Inc., Baxter International, Inc., BioPort Corporation, Inc., Eli Lilly and Company, Merck & Company, and SmithKline Beecham Corporation for reconsideration of this court's June 21, 2002 order granting plaintiffs' motion to remand. Plaintiffs have not filed a formal response in opposition to the motion, but have advised the court by letter

that they do oppose the motion. For the reasons that follow, the court concludes that defendants' motion to reconsider should be granted and that this court's previous order remanding the case should be vacated.

Among other things, this court expressed the view in its June 21 opinion and order that "defendants unquestionably ha[d] the better of the argument on the issue of whether injuries alleged to have resulted from thimerosal in vaccines constitute vaccine-related injuries under the (National Childhood Vaccine Injury Act (Vaccine Act))" so as to be consequently barred by the Vaccine Act's ban on tort claims,[1] and that the court had no doubt that it would conclude that the plaintiffs' claims were vaccine-related if the issue were presented to the court in a context other than fraudulent joinder. The court, though, held that it could not say there was no reasonable possibility of recovery. In other words, the court expressed the view that there existed a reasonable possibility that a court might accept the plaintiffs' argument

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1. As explained at length in its earlier opinion, the Vaccine Act provides that "[n]o person may bring a civil action . . . against a vaccine administrator or manufacturer in a state or federal court for damages arising from a vaccine-related injury or death . . . unless a petition has been filed" first in the Court of Federal Claims, and mandates that if a claimant files such a suit "in a State or Federal court" prior to petitioning the Court of Federal Claims, such state or federal court "shall dismiss the action." 42 U.S.C. § 300aa-11(a); *see also Shalala v. Whitecotton*, 514 U.S. 268, 270, 115 S. Ct. 1477, 1478, 131 L. Ed. 2d 374 (1995) ("A claimant alleging that more than $1,000 in damages resulted from a vaccination after the Act's effective date in 1988 must exhaust the Act's procedures and refuse to accept the resulting judgment before filing any de novo civil action in state or federal court.").

that thimerosal was an adulterant or contaminant so that their claims for injuries from thimerosal in vaccines were not vaccine-related and hence were not barred by the Vaccine Act.

While the court is not persuaded that its conclusion in this regard was manifestly erroneous, the court is persuaded that events which have occurred since entry of the court's order foreclose any reasonable possibility that the plaintiffs have stated a currently cognizable claim against the resident defendants. To the point, on July 3, 2002, the Court of Federal Claims Office of Special Masters entered Autism General Order #1, in which it expressly assumed jurisdiction under the Vaccine Act over Vaccine Program claims alleging a causal relationship between autism, or neurodevelopment disorders similar to autism, and certain vaccinations, including the Measles-Mumps-Rubella vaccinations, and/or "by the 'thimerosal' ingredient contained in certain Diphtheria-Tetanus-Pertusis ("DTP"), Diphtheria-Tetanus-acellar Pertussis ("dTaP"), Hepatitis B, Hemophilus Influenza Type B ("HIB") vaccinations," or by some combination of the two. Since the Court of Federal Claims has jurisdiction only to grant relief under the Vaccine Act for "vaccine-related" injuries, and since the Office of Special Masters has explicitly assumed jurisdiction over claims for injuries alleged to have been caused by thimerosal in certain vaccines, it necessarily follows that the Office of Special Masters has implicitly rejected the notion that thimerosal is an adulterant or contaminant and has concluded that such claims for these injuries are "vaccine related." Thus, even assuming that this court was correct in its earlier assessment of plaintiffs' possibility of recovery against the resident defendants, given

this more recent circumstance, the court now concludes that there no longer exists any reasonable possibility that the claims asserted by the plaintiffs against the resident defendants are presently cognizable in any forum other than the Court of Federal Claims. Accordingly, the court will vacate its order remanding the case.

Based on the foregoing, it is ordered that defendants' motion to vacate the court's remand order is granted.

SO ORDERED this 1st day of August, 2002.

s/ Tom S. Lee
UNITED STATES DISTRICT JUDGE

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DENYING PETITION FOR REHEARING DATED OCTOBER 4, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE COURT OF APPEALS

No. 02-60736

Bryan D. Collins, as parent and next friend of Zachary W. Collins; Allyson M. Collins, as parent and next friend of Zachary W. Collins; Freddie M. Anderson, as parent and next friend of Robert Thomas-Anderson; Georgia M. Anderson, as parent and next friend of Robert Thomas-Anderson; Herman R. Bernard, as parent and next friend of Reginald L. Bernard; et al.,

Plaintiffs-Appellants,

v.

American Home Products Corporation, doing business as Wyeth Laboratories Inc.; Wyeth Lederle; Wyether Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories; American International Chemical Inc.; Aventis Pasteur Inc., Individually and as Successor in Interest to Connaught Laboratories Inc.; Pasteur Merieux Connaught Inc.; B.F. Ascher & Company Inc.; Baxter International Inc., Individually and as Successor in Interest to North American Vaccine Inc.; Bayer Corp; Bioport Corporation Inc.; Bristol-Myers Squibb Co; Evans Medical Ltd.; Merck and Company Inc.; RPK Pharmaceuticals; Dolder; Eli Lilly & Co; Smithkline Beecham Corp; Lisa Stone, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Bert Bradford, M.D.; Gulf Coast Pediatric

Clinic; Byron's Discount Drugs; Jeff Court, M.D., individually and as Successor in Interest to Children's Medical Group, P.A.; Walter E. Dawkins, M.D.; Louisa Lawson, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, M.D.; Julian Lee Owen, M.D.; Village Pharmacy; John Does; Children's Medical Group P.A.,

Defendants-Appellees.

CONSOLIDATED WITH
NO. 02-60764

John W. Stewart, III; Annette C. Stewart; Bryan D. Collins; Allyson M. Collins; Herman R. Bernard, Jr.; Carola H. Bernard; Larry D. Blackwell; Melissa L. McGrew; Jules J. Cousin, Jr.; Beverly Cousin; John Gamberi; Connie Gamberi; Mark Klinedinst; Laurie Klinedinst; Terri M. Pitts; Tracy Pitts; Kevin T. Samuel; Victoria Samuel; David G. Underwood; Lauren Underwood; Jeremy Williams; Shawanda R. Williams,

Plaintiff-Appellants,

v.

American Home Products Corporation, doing business as Wyeth; Wyeth Laboratories; Wyeth-Ayerst; Wyeth-Ayerst Laboratories; Wyeth Lederle; Wyther Lederle; Wyether Lederle Vaccines and Lederle Laboratories; Abbott Laboratories Inc.; American International Chemical Inc.; Aventis Pasteur Inc., individually and as successor in interest to Connaught Laboratories Inc.; Pasteur Merieux & Pasteur Merieux Connaught; B.F. Ascher & Company Inc.; Baxter International Inc., individually and as successor in interest to North American

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Vaccine Inc.; Bioport Corporation Inc.; Evans Medical Limited; Dolder; Eli Lilly & Co; Merck and Company Inc.; Smithkline Beecham Corp; Bert Bradford, M.D.; Gulf Coast Pediatric Clinic; Walter E. Dawkins, M.D.; Owen Lee, M.D.; Sartin's Discount Drugs Inc.; Brian Stretch, doing business as The Street Clinic, M.D.; Village Pharmacy; Wyeth; John Does, 1-200, who are individuals, proprietorships, corporations, or other entities whose names and identities are otherwise unknown to the plaintiffs; Jeffrey Crout, M.D.; Children's Medical Group P.A.; RPK Pharmaceuticals,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Mississippi, Jackson

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 9/9/03, 5 Cir., _____, _____ F.3d _____)

Before EMILIO M. GARZA and DENNIS, Circuit Judges, and DUPLANTIER*, District Judge.

---

* Senior District Judge of the Eastern District of Louisiana, sitting by designation.

* Judges King, Jones and Clement did not participate in the consideration of the en banc rehearing.

Appendix F

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

ENTERED FOR THE COURT:

s/ Emilio M. Garza
United States Circuit Judge

(2)

Supreme Court, U.S.
FILED
DEC 28 2004
OFFICE OF THE CLERK

No. 04-674

IN THE
Supreme Court of the United States

AMERICAN HOME PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

BRYAN D. COLLINS, *et al.*, and JOHN W. STEWART, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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December 2004

QUESTION PRESENTED

Whether a defendant can remove a case containing diverse and non-diverse defendants based on a theory of fraudulent joinder when the argument proffered to prove fraudulent joinder, if correct, would be dispositive of the case against both the diverse defendants and the non-diverse defendants.

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STATEMENT OF THE CASE

Mercury exposure has long been known to cause serious neurological effects in humans and to interfere with the development of children's nervous systems. For many years, thimerosal, which is 49.6 percent mercury, was used as a preservative in many vaccines administered to children.

This opposition is filed on behalf of all respondents in two separate appeals consolidated before the Fifth Circuit. In one of the cases, *Collins v. American Home Products Corp.*, parents of children who suffered severe health problems after being injected with vaccines containing thimerosal filed suit in Mississippi state court against physicians, pharmacies, and pharmaceutical companies who had prescribed, marketed, sold, or manufactured vaccines and/or the thimerosal used in vaccines. The parents sought recovery under state-law theories of strict liability, negligence, fraud, negligent misrepresentation, and breach of warranty. They argued that the vaccines were defectively designed and inadequately tested, and that the defendants failed to warn them about the vaccines' risks. Complaint at 9-21, 25-32.

Although some defendants are Mississippi citizens, the defendants removed the case to federal district court, claiming both diversity and federal question jurisdiction. With respect to diversity jurisdiction, defendants asserted that plaintiffs had failed to exhaust their administrative remedies with respect to the Mississippi defendants, as required by the National Childhood Vaccine Injury Act, 42 U.S.C. § 300aa-1 *et seq.* ("Vaccine Act"). The Vaccine Act directs that a plaintiff seeking compensatory damages against a vaccine manufacturer or administrator for injuries caused by a vaccine must first file a petition with a special "Vaccine Court" under the jurisdiction of the United States Court of Federal Claims. *Id.* § 300aa-11(a)(2)(A). Defendants contended that plaintiffs' failure to file

their claim against the Mississippi defendants with the Vaccine Court divested the state court of jurisdiction over the claims against those defendants, and, therefore, that the Mississippi defendants had been fraudulently joined. R.E. Tab 6 at 3-4.[1]

Plaintiffs moved to remand, arguing that the exhaustion requirement did not apply because injuries associated with thimerosal were not "vaccine-related" injuries, as defined by the Vaccine Act. Thimerosal, they explained, is an "adulterant or contaminant," and the definition of vaccine-related injuries in the Act specifically excludes conditions associated with intentionally added adulterants or contaminants. *Id.* at 7-8. The district court granted plaintiffs' motion to remand, finding no basis for federal question jurisdiction and holding that the in-state defendants were not fraudulently joined because there was a possibility of recovery against them. *Id.* at 15-16.

Defendants moved for reconsideration. R.E. Tab 5. The district court granted the motion, holding that, in light of a newly issued Vaccine Court order asserting jurisdiction over certain thimerosal-related claims, there was no reasonable possibility that the plaintiffs could recover against the Mississippi defendants. Pet. App. 17a-18a. Having held that removal was proper, the court then dismissed the entire case on the ground that plaintiffs had not exhausted their Vaccine Act remedies as to the claims against any defendant. *Id.* 6a-7a.

The *Collins* plaintiffs appealed, and the appeal was consolidated with another case, *Stewart v. American Home*

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[1]Citations to R.E. refer to the Record Excerpts filed in the Fifth Circuit in *Collins v. American Home Products Corp.*, No. 02-60736.

Products Corp. Stewart was based on identical facts but was brought on behalf of some of the parents themselves. The appeal in *Stewart* raised the same joinder issues as the appeal in *Collins*.

While the *Collins* and *Stewart* appeals were pending, the Fifth Circuit issued *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir. 2003). There, a diverse defendant removed a case to federal court on the basis of diversity jurisdiction, even though the other defendant was not diverse. The district court denied the plaintiff's motion to remand, finding that the non-diverse defendant was fraudulently joined because the claims against it were preempted by the Federal Railroad Safety Act (FRSA). The court then granted summary judgment to the diverse defendant on that same ground—that the claims against it were preempted by the FRSA. The Fifth Circuit reversed, refusing to find fraudulent joinder based on a defense that was equally dispositive of the claims against the diverse and non-diverse defendants. It indicated that finding fraudulent joinder under such circumstances would be "contrary to the Supreme Court's century-old command in [*Chesapeake & Ohio Railway Co. v. Cockrell*, 232 U.S. 146, 153 (1914)] that the fraudulent joinder allegations be directed toward the joinder, not to 'the merits of the action as an entirety.'" *Smallwood*, 342 F.3d at 407.

Soon thereafter, the Fifth Circuit issued its decision in *Collins* and *Stewart*. In a brief opinion, the court relied on *Smallwood* for the proposition that "[w]here there are colorable claims or defenses asserted against or by diverse and non-diverse defendants alike, the court may not find that the non-diverse parties were fraudulently joined based on its view of the merits of those claims or defenses. Instead, that is a merits determination which must be made by the state court." Pet.

App. 4a (quoting *Smallwood*, 342 F.3d at 405 (quoting *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990))). The court vacated the dismissal of plaintiffs' claims and remanded with instructions that *Collins* and *Stewart* be remanded to state court. *Id.* 5a.

The Fifth Circuit subsequently granted rehearing en banc in *Smallwood* and stayed the mandate in *Collins* and *Stewart* pending its en banc decision. The en banc court affirmed the panel court's decision in *Smallwood*, holding that "when a nonresident defendant's showing that there is no reasonable basis for predicting that state law would allow recovery against an in-state defendant equally disposes of all defendants, there is no improper joinder of the in-state defendant." *Smallwood v. Ill. Cent. R.R. Co.*, 385 F.3d 568, 571 (5th Cir. 2004) (en banc). Citing *Cockrell*, the court explained that the purpose of the fraudulent joinder theory is to determine whether the in-state defendants have been properly joined. In *Smallwood*, although the diverse defendant made its preemption argument first with respect to the non-diverse defendant only, the argument did not go to the propriety of the joinder, but to the merits of the entire case. The court explained that allowing a federal court to decide a case with both diverse and non-diverse defendants just because the federal court deemed the case meritless "is not a rule of joinder, but a recrafting of *Strawbridge* [*v. Curtiss*, 7 U.S. (3 Cranch.) 267 (1806)]," which held that complete diversity is necessary for diversity jurisdiction. *Id.* at 576. The Court concluded by noting that the decision to extend federal jurisdiction to cases in which there was not complete diversity was a political decision that could not be made by federal courts, but only by Congress. *Id.*

After issuing its en banc decision in *Smallwood*, the Fifth Circuit denied the *Collins* and *Stewart* defendants' motions for

panel rehearing and for rehearing en banc. Pet. App. 22a. Some of the diverse defendants also moved to stay the mandate in light of *Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004), which held that claims against thimerosal manufacturers are not subject to the Vaccine Act because thimerosal manufacturers are not "vaccine manufacturers" as defined in the Act. The Fifth Circuit denied that motion as well.

REASONS FOR DENYING THE WRIT

A. The Question Presented Depends On The Resolution Of An Independent Question That Is Not Presented For Review.

Under the Fifth Circuit's decision, because the basis for dismissing the Mississippi defendants would justify dismissing the entire case against all defendants, joinder of the non-diverse defendants was not "fraudulent" or "improper." Neither *Collins* nor *Smallwood* decided or even considered how this analysis would apply in a case where the basis for dismissal of the non-diverse defendants applies to some but not *all* of the diverse defendants.

The question presented in the petition, therefore, arises in these cases only if *all* of the claims against *all* of the defendants are subject to the Vaccine Act. However, if thimerosal is an intentionally added contaminant or adulterant, *see* 42 U.S.C. § 300aa-33(5), or if thimerosal manufacturers are not "vaccine administrators or manufacturers," *see id.* § 300aa-11(a)(2)(A), the Act's exhaustion requirements do not apply to some or all of the defendants.

Accordingly, to determine whether the question presented in the Petition is in fact presented in the case, the

Court would first have to decide whether the Vaccine Act's claim procedure applies to thimerosal-related injuries and thimerosal manufacturers. That narrow issue is unresolved. Indeed, Petitioners themselves seem to disagree on this point. *See* Pet. 20 n.8. And yet petitioners do not seek certiorari on that issue. Moreover, after considering that issue, the Court might conclude that the question presented to the Court is not, in fact, presented in this case.

B. There Is No Meaningful Circuit Split On The Question Presented.

Petitioners' primary argument for review is that the decision below created a circuit split. No circuit court that has analyzed the issue, however, has disagreed with the Fifth Circuit that fraudulent joinder cannot be based on a defense or claim that disposes of the case against both the diverse and non-diverse parties. To the contrary, the only other federal circuit to have discussed the issue—the Third—also held that fraudulent joinder cannot be based on claims or defenses common to both diverse and non-diverse parties. *See Boyer v. Snap-On Tools*, 913 F.2d 108 (3d Cir. 1990).

Petitioners attempt to manufacture a conflict by pointing to *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). There, however, the plaintiff did not argue that the common defense theory applied,[2] and the court did not analyze the issue. In *Ritchey*, the plaintiff brought suit in state court against one diverse and two non-diverse defendants. The same plaintiff had previously sued in federal court against the diverse defendant

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[2]The plaintiff's appellate briefs in *Ritchey* are available on Westlaw at 1996 WL 33417453 and 1997 WL 33493575.

based on the same underlying facts, but that case had been dismissed because the statute of limitations had run. The Ninth Circuit's discussion of fraudulent joinder focused on whether the plaintiff stated a cause of action against the in-state defendants, given that the statute of limitations against them had already run. The court concluded that the plaintiffs did not state a cause of action and, thus, that the in-state defendants had been fraudulently joined. In the final paragraph of this discussion, the court noted that it was "slightly peculiar" to call the in-state defendants sham defendants when the statute of limitations had also run against the diverse defendant. *Id.* at 1320. Then, in a single sentence and without citation to any authority, the court stated that, nonetheless, the failure to state a claim demonstrated that the in-state defendants were sham defendants. *Id.* Petitioners' assertion that there is a split between the circuits depends on this one passing observation by the Ninth Circuit.

Somewhat half-heartedly, petitioners suggest that *LeBlang Motors, Ltd. v. Subaru of America., Inc.*, 148 F.3d 680 (7th Cir. 1998), presents an "implied split" with the decision below. Pet. 23 & n.12. In *LeBlang*, the court did not even consider whether fraudulent joinder could be based on defenses shared by diverse and non-diverse defendants. Rather, it upheld the dismissal of non-diverse defendants because the statute of limitations against them had run, without mentioning in the discussion of fraudulent joinder that at the time the case was filed the statute of limitations against the diverse defendant had run as well. The opinion offers no indication that the court gave any thought to the question presented here, and the common defense issue is not an aspect of the Seventh Circuit's holding.

Because no court of appeals to have analyzed the issue has disagreed with the decision below, the petition should be denied.

C. This Court Should Not Review Whether The Fifth Circuit Correctly Applied Its Own Precedent.

Petitioners argue at some length that the Fifth Circuit erred in applying *Smallwood* to this case, where the defense at issue was procedural, as opposed to a defense on the merits. Pet. 17-20. This argument, however (and the second question presented, which is based on it), addresses the Fifth Circuit's application of its own precedent. The question whether a court properly applied its own precedent is a matter for that court. Moreover, the Fifth Circuit clearly disagreed with petitioners' analysis of its case law, as it denied their petition for en banc review and their motions to stay the mandate. *See* Pet. App. 22a; *Collins v. Am. Home Prods. Corp.*, No. 02-60736 (5th Cir. Dec. 1, 2004) (unpublished order) (denying motion to recall and stay the mandate); *Collins v. Am. Home Prods. Corp.*, No. 02-60736 (5th Cir. Nov. 12, 2004) (unpublished order) (denying motion to stay the mandate).

Similarly, petitioners (except Eli Lilly and Company) assert that the Circuit's common defense doctrine should not have been applied in this case because of the Fifth Circuit's later decision in *Moss*, 381 F.3d 501. Again, the Fifth Circuit denied petitioners' motions on this point. *Collins*, Order dated Dec. 1, 2004, *supra*; *Collins*, order dated Nov. 12, 2004, *supra*. And whether the Fifth Circuit correctly applied its own law is not a question that merits this Court's attention.

D. The Decision Below Is Correct.

This Court has recognized that when a showing "indicate[s] that the plaintiff's case was ill founded as to all the defendants," such a showing goes "to the merits of the action as an entirety, and not to the joinder." *Cockrell*, 232 U.S. at 153

(1914). In other words, such a showing does not "engender or compel the conclusion that the [in-state defendants] were wrongfully brought into a controversy that does not concern them." *Id.*

Both the Third and Fifth Circuits have applied *Cockrell* to hold that defenses that are determinative of the claims against all of the defendants cannot be used as a basis for a finding of fraudulent joinder. As this Court did in *Cockrell*, those courts recognized that when a court concludes that a case is untenable as to all defendants, it is not deciding an issue related to joinder; rather, it is determining the entire case. "In such cases, it makes little sense to single out the in-state defendants as 'sham' defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such[.]" *Smallwood*, 385 F.3d at 574.

The courts of appeals' holdings on common defenses ensures that the theory of fraudulent joinder remains true to the purposes for which it was created. As petitioners point out, the fraudulent joinder doctrine is intended to guarantee that non-diverse defendants are not joined solely to defeat diversity jurisdiction. *See* Pet. 9. If a defense common to all defendants could form the basis for a finding of fraudulent joinder, then fraudulent joinder could be found in many cases in which the plaintiff did not sue the non-diverse defendant for the improper purpose of defeating diversity, but in which the plaintiff just had a weak case.

The decision below also protects the boundary between state and federal jurisdiction. Plaintiffs are entitled to have state courts decide the merits of cases alleging state-law claims against both diverse and non-diverse defendants. Diverse

defendants often prefer to remove cases to federal court due to their perception that the federal forum will be more favorable to them. Under petitioners' theory, such defendants can manipulate the system by removing the case, arguing their defenses as to the in-state defendants, and then arguing those exact same defenses as to the diverse defendants. Forbidding defenses common to all defendants from being used as the basis for a finding of fraudulent joinder ensures that fraudulent joinder is not used as a means to circumvent limits on federal jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

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IN THE

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AMERICAN HOME PRODUCTS CORPORATION, *et al.*,

Petitioners,

v.

BRYAN D. COLLINS, *et al.*
and JOHN W. STEWART, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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CORPORATE DISCLOSURE STATEMENT

Petitioners' corporate disclosure statement was set forth at pages *v-vi* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

Petitioners file this Reply to the Brief in Opposition submitted by Respondents (referenced in the Petition and below as "Plaintiffs").

A. The "Independent Question" Plaintiffs Suggest Is a Precursor to Review Is Irrelevant

Plaintiffs attempt to distract the Court from the serious and far-reaching jurisdictional questions presented in the Petition by claiming that a threshold inquiry must first be answered. According to Plaintiffs, the Court's resolution of this other subsidiary question—one not presented for review by Petitioners—might demonstrate that the questions that ***are*** presented are simply illusory here.

The "independent question" Plaintiffs describe actually consists of two distinct questions, neither of which requires the Court's attention before addressing the issues presented in the Petition. The first question is whether the Vaccine Act's "adulterant-contaminant" exception applies to thimerosal claims, which if answered in the affirmative would remove this case entirely from the purview of the Act. *See* 42 U.S.C. § 300aa-33(5) (defining "vaccine-related injury" as "an illness, injury condition, or death associated with one or more of the vaccines set forth in the Vaccine Injury Table, except that the term does not include [conditions] associated with an adulterant or contaminant intentionally added to such a vaccine."). The second is whether the manufacturers of thimerosal, the vaccine preservative at issue, are entitled to the protections of the Act.[1]

1. A Fifth Circuit decision subsequent to *Collins* addressed the scope of the Vaccine Act as to thimerosal defendants and was disclosed by Petitioners in a footnote to their Petition. *See Moss v. Merck & Co.*, 381 F.3d 501 (5th Cir. 2004), cited in Petition at n.8.

In its decision, the Fifth Circuit assumed both the application of the Vaccine Act generally and its application to the thimerosal defendants specifically. *See* App. 4a-5a & n.1 (stating that "the remaining defenses apply equally to the claims asserted against the diverse and nondiverse defendants . . ."). Thus the questions presented for review have been defined by the court of appeals and are precisely positioned for this Court's consideration. The notion that any particular issue must be ruled upon by this Court before reaching the question of broad jurisprudential application is simply incorrect: "The Court often grants certiorari to decide particular legal issues while assuming without deciding the validity of antecedent propositions. . . ." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 272 (1990).

Further, if Plaintiffs believe there is a legitimate question presented as to whether the Vaccine Act applies to thimerosal claims, ***they*** should have raised it in a conditional cross-petition. Presumably, they did not because the question has been settled against them by every court to have considered the issue. *See, e.g., Moss v. Merck & Co.*, 381 F.3d 501, 504 (5th Cir. 2004) (observing the "unremarkable proposition that a Thimerosal-related injury, occurring as a result of the administration of a vaccine, is a vaccine-related injury within the meaning of the Vaccine Act").[2]

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2. There is simply no question that thimerosal, as a "constituent material" of vaccines which "maintain[s] [their] safety, purity and potency," is the very opposite of an "adulterant or contaminant," and that injuries cannot be "thimerosal related" without being "vaccine-related" as well. *See Owens v. Am. Home Prods. Corp.*, 203 F. Supp. 2d 748, 755-56 (S.D. Tex. 2002). Accordingly, every court, without exception, to have considered the issue has concluded, as a matter of law, that thimerosal is ***not*** an adulterant and that (Cont'd)

Plaintiffs raise these subsidiary issues under the Vaccine Act in order to paint the questions presented as limited by the specific facts of this case. *See* Brief in Opposition, p. 5 ("Neither *Collins* nor *Smallwood* decided or even considered how this analysis would apply in a case where the basis for dismissal of the non-diverse defendants applies to some but not all of the diverse defendants."). But in doing so they make precisely the central point Petitioners sought to show the Court with their Petition: The Fifth Circuit has created a rule with application far beyond the borders of this case, without adequately contemplating its unjustified consequences on federal jurisdictional jurisprudence.

(Cont'd)

thimerosal-related injury claims must first be pursued in the Vaccine Court. *See Owens v. Am. Home Prods. Corp.*, 203 F. Supp. 2d 748, 756 (S.D. Tex. 2002); *Blackmon v. Am. Home Prods. Corp.*, 267 F. Supp. 2d 667 (S.D. Tex. 2002); *Strauss v. Am. Home Prods. Corp*, 208 F. Supp. 2d 711 (S.D. Tex. 2002); *Liu v. Aventis Pasteur, Inc.*, 219 F. Supp. 2d 762 (W.D. Tex. 2002); *Wax v. Aventis Pasteur Inc.*, No. CV 02-2018 (E.D.N.Y. Oct. 28, 2002), as clarified by Order dated Dec. 16, 2002, 240 F. Supp. 2d 191 (E.D.N.Y. 2002); *Murphy (Joshua) v. Aventis Pasteur, Inc.*, 270 F. Supp. 2d 1368 (N.D. Ga. 2003); *Laughter v. Aventis Pasteur Inc.*, 291 F. Supp. 2d 406 (M.D.N.C. 2003); *Cheskiewicz v. Aventis Pasteur, Inc.*, 843 A.2d 1258 (Pa. Super. Ct. 2004); *Ashton v. Aventis Pasteur, Inc.*, 851 A.2d 908 (Pa. Super. Ct. 2004). To date, some seventy-four additional unpublished decisions exist with the identical holding.

B. Plaintiffs Cannot Deny That the Same Issues Have Been Presented and Resolved Differently in Cases From Multiple Circuits

Plaintiffs claim that the Fifth Circuit's conflict with the *Ritchey* decision is a "manufactured" one, despite the fact that *Ritchey* also construes *Cockrell* and plainly finds that the common defense theory should only be applied in the merits context and not a procedural one, a direct conflict with the facts of this case. *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998). Further, even the *Smallwood* decision itself acknowledged that *Ritchey* was at odds with its decision. *Smallwood v. Ill. Cent. R. Co.*, 385 F.3d 568, 575 n.21 (5th Cir. 2004). Plaintiffs nevertheless struggle to downplay this conflict, pointing to the fact that the plaintiffs in *Ritchey* did not raise the common defense theory in their briefing (without noting that Plaintiffs themselves failed to make any such challenge below). Ultimately the point is irrelevant, given that matters of subject matter jurisdiction cannot be waived and can and must be raised *sua sponte* by the federal courts.[3] *See, e.g.*, *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 ("[S]ubject-matter delineations must be policed by the courts on their own initiative even at the highest level.").[4]

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3. Plaintiffs similarly question the existence of the implied split created by *LeBlang Motors, Ltd. v. Subaru of America, Inc.*, 148 F.3d 680 (7th Cir. 1998), again ignoring the fact that a court has no choice but to consider matters of subject matter jurisdiction even when they are not raised or briefed by the parties.

4. Even were the Court to find that the split among the circuits was less than obvious at the time this case was decided, the Fifth Circuit's subsequent decision in *Rainwater v. Lamar Life Ins. Co.*, 391 F.3d 636 (5th Cir. Nov. 16, 2004), a statute of limitations case like *Ritchey*, plainly demonstrates that the Fifth Circuit's view of the common defense rule is squarely at odds with *Ritchey*.

C. This Case Presents More Than Mere Error Correction

This case presents a clear demonstration of jurisdictional vagaries and incongruent results spawned by the common defense rule as announced in *Smallwood* and further defined in this case. In the questions presented, Petitioners are not merely seeking a "correction" of the decision of the Fifth Circuit or its application of its own precedent. Rather, this matter illustrates the potential for extensive and unjustifiable application of an ill-considered federal jurisdictional rule to deny a federal forum to improperly joined defendants in myriad cases. Weighty issues of federal procedure and diversity jurisdiction are implicated by the decisions of the Courts of Appeals on this subject, and they deserve review by this Court.

CONCLUSION

For the reasons already stated in the Petition and those above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. 04-674

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Petitioners,

v.

BRYAN D. COLLINS, *et al.*,
and JOHN W. STEWART, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the Washington Legal Foundation (WLF) respectfully moves for leave to file the attached brief as *amicus curiae* in support of Petitioners. Counsel for Petitioners has consented to the filing of this brief. Counsel for Respondents declined to consent, thereby necessitating the filing of this motion.

WLF is a non-profit public interest law and policy center with supporters in all 50 states, including many in Mississippi. WLF regularly appears before federal and state courts to promote economic liberty, free enterprise, and a limited and

accountable government. In particular, WLF regularly files briefs in product liability cases in which the procedural fairness of suits filed against drug and medical device manufacturers can reasonably be called into question. *See, e.g., Howland v. Purdue Pharma LP*, 2004 Ohio 6552 (2004); *United States ex rel. Gilligan v. Medtronic, Inc.*, No. 03-4213 (6th Cir., dec. pending).

WLF fully supports Petitioners' request that the Court grant review of both of the Questions Presented in this Petition. WLF writes separately in order to emphasize its particular concern over the first Question Presented. WLF is concerned that the novel rule announced by the Fifth Circuit in this case and *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*), will significantly impair the right of out-of-state defendants to remove cases to federal court pursuant to the federal courts' diversity jurisdiction -- thereby frustrating the intent of Congress that such cases be removable as a means of ensuring that out-of-state defendants can have their cases heard in an impartial forum. WLF is also concerned that the result of such impairment will be a significant increase in health-care costs in general, and the costs of vaccines in particular.

WLF is filing this brief because of its interest in promoting the welfare of the health care industry and the public at large; it has no direct interest, financial or other, in the outcome of this lawsuit. Because of its lack of direct economic interests, WLF believes that it can assist the Court by providing a perspective that is distinct from that of any party.

For the foregoing reasons, the Washington Legal Foundation respectfully requests that it be allowed to participate in this case by filing the attached brief.

Respectfully submitted,

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(Counsel of Record)
Washington Legal Foundation
2009 Massachusetts Ave, NW
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January 19, 2005

QUESTION PRESENTED

Amicus curiae addresses the following issue only:

Is a defendant's statutory right to removal foreclosed solely because a defense common to both diverse and non-diverse defendants serves as the basis for a finding that the nondiverse party has been fraudulently joined?

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IN THE
SUPREME COURT OF THE UNITED STATES

No. 04-674

AMERICAN HOME PRODUCTS CORP., *et al.*,
Petitioners,

v.

BRYAN D. COLLINS, *et al.*,
and JOHN W. STEWART, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

INTERESTS OF *AMICUS CURIAE*

The interests of *amicus curiae* Washington Legal Foundation (WLF) are set forth in the motion accompanying this brief.[1]

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than WLF and its counsel, contributed monetarily to the preparation and submission of this brief.

STATEMENT OF THE CASE

Congress has determined that, in general, parties sued in a State court are entitled to remove the case to federal court if the federal district courts have original, diversity jurisdiction over the action. 28 U.S.C. § 1441. In determining whether diversity jurisdiction cases are removable, Congress has instructed courts to focus on the citizenship of only those defendants who have been "*properly* joined and served." *Id.* (emphasis added). This case tests whether the heretofore uniformly recognized definition of a "properly joined" defendant should be expanded substantially (as the Fifth Circuit held), thereby significantly impairing the ability of defendants to exercise their statutory right to removal -- a right that has existed throughout our nation's history.

This petition involves two lawsuits filed in Mississippi state court for injuries arising out of the vaccination of children. In *Stewart*, the plaintiffs (all Mississippi citizens) are the children's parents, seeking to recover medical expenses they incurred as a result of their children's injuries, as well as emotional distress damages. In *Collins*, the same plaintiffs are suing in their capacity as parents and next friends of their children, seeking to recover for their children's injuries. Each of the plaintiffs contends that the alleged injuries were caused by the preservative thimerosal, which until recently was an ingredient in virtually every vaccine administered in this country. Named as defendants are the alleged vaccine manufacturers; the alleged manufacturers of the thimerosal used in the vaccines; and the doctors, medical practices, and pharmacies who allegedly manufactured, distributed, and/or administered the vaccines (the "vaccine administrators"). The vaccine administrators are the only defendants who are citizens of Mississippi.

The defendants removed the two cases to the U.S. District Court for the Southern District of Mississippi, invoking diversity jurisdiction. The defendants contended that the citizenship of the vaccine administrators should be disregarded under the doctrine of "fraudulent joinder," *i.e.*, the vaccine administrators were not "properly joined" within the meaning of § 1441 but instead had been added as defendants in an effort to defeat the district court's diversity jurisdiction. The defendants alleged that the district court lacked subject matter jurisdiction over the vaccine administrators because the plaintiffs had failed to comply with the National Childhood Vaccine Injury Act of 1986 (the "Vaccine Act"), 42 U.S.C. § 300aa-1 *et seq.*[2] It is uncontested that if the citizenship of the vaccine administrators is disregarded, no defendant is a citizen of the same state as any of the plaintiffs.

On August 1, 2002, the district court issued orders denying motions to remand *Stewart*, Pet. App. 10a-14a, and *Collins*. *Id.* 15a-18a. Applying the fraudulent joinder doctrine, the court held that "there was no reasonable possibility that the plaintiffs could establish a basis for recovery against the resident defendants," and thus that the citizenship of those defendants should be ignored for purposes of determining diversity jurisdiction. *Id.* 11a. The district court subsequently granted the remaining defendants' motions to dismiss, finding that the plaintiffs' failure to exhaust Vaccine Act remedies barred their tort claims against the other defendants as well. *Id.* 6a-7a, 8a-9a. The correctness of the district court's exhaustion-of-remedies ruling is not at issue in this Petition.

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[2] The defendants contended that jurisdiction was barred by 42 U.S.C. § 300aa-11(a)(2)(A) because the plaintiffs had not yet exhausted remedies provided under the Vaccine Act, by filing a petition for compensation under 42 U.S.C. § 300aa-11(a)(1).

On appeal, the Fifth Circuit vacated the dismissal of the plaintiffs' claims and remanded with instructions that the district court remand both cases to the state court from which they were removed. *Id.* 1a-5a. The appeals court did not quarrel with the basic test adopted by the district court in deciding fraudulent joinder claims. However, the appeals court announced a previously unarticulated and significant limitation on such claims: a diversity case is not removable under a fraudulent joinder theory if the grounds for asserting fraudulent joinder is also a complete defense to the claims asserted against the nonresident defendants. *Id.* 4a-5a.[3] Asserting that the Vaccine Act exhaustion-of-remedies defense was equally applicable to the resident vaccine administrators and the nonresident defendants, the Fifth Circuit held that fraudulent joinder was inapplicable as a matter of law under such circumstances. *Id.* At no time did the court express any disagreement with the district court's finding that "there was no reasonable possibility that the plaintiffs could establish a basis for recovery against the resident defendants." *Id.* 11a.

The Fifth Circuit later granted rehearing *en banc* in *Smallwood* and stayed the mandate in this case pending the outcome of that rehearing. In September 2004, the Fifth Circuit voted 9-6 (with a 16th judge dissenting and concurring in the judgment) to stand by its original rationale. *Smallwood v. Illinois Central Railroad Co.*, 385 F.3d 568 (5th Cir. 2004) (*en banc*). The appeals court reiterated its long-standing "test for fraudulent joinder":

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[3] The appeals court based its rationale on a Fifth Circuit panel decision issued while this case was on appeal: *Smallwood v. Illinois Central Railroad Co.*, 342 F.3d 400 (5th Cir.), *vacated on reh'g en banc*, 355 F.3d 357 (5th Cir. 2003).

> [W]hether the defendant has demonstrated that there is no possibility of recovery by the plaintiff against the in-state defendant, which stated differently means that there is no reasonable basis for the district court to predict that the plaintiff might be able to recover against an in-state defendant.

Id. at 573.[4] The court went on to hold that fraudulent joinder nonetheless is *not* established if the rationale for asserting that there is no possibility of recovery by the plaintiff against the in-state defendant is equally applicable to the nonresident defendant -- thereby precluding recovery against the nonresident defendant as well. *Id.* at 574. The court held:

> In such cases, it makes little sense to single out the in-state defendants as "sham" defendants and call their joinder improper. In such circumstances, the allegation of improper joinder is actually an attack on the merits of plaintiff's case as such.

Id.[5]

In a dissent joined by six other judges, Judge Jolly argued that the majority's rule departed sharply from past Fifth Circuit understandings of "fraudulent joinder." *Id.* at 578 (Jolly, J., dissenting). Judge Jolly explained that prior case law, in discerning whether defendants had been fraudulently

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[4] The court also recognized a second means by which a defendant can establish fraudulent joinder: "actual fraud in the pleading of jurisdiction facts." *Id.* This alternative test is not at issue in this petition, nor was it at issue in *Smallwood*.

[5] A certiorari petition in *Smallwood* is also pending with the Court. *See* No. 04-831.

joined for the purpose of defeating diversity jurisdiction, looked not to the plaintiff's subjective intent but to an objective appraisal of whether there was any possibility of recovery by the plaintiff against an in-state defendant. *Id.* He said that the court's traditional objective test was easily applied and was based on the "reasonable and fair . . . assum[ption] that a lawyer, acting in accordance with the code of professional responsibility, will not sue someone against whom he has no reasonable basis of recovery, unless it is for an improper reason." *Id.* Judge Jolly criticized the majority for needlessly complicating the fraudulent joinder test by requiring district courts "to go one step further" than the traditional test, and "examine the entirety of the case" to see whether there exists a common defense that would negate a finding of fraudulent joinder. *Id.*

Following issuance of the *en banc Smallwood* decision, the Fifth Circuit denied pending petitions for rehearing and rehearing *en banc* in this case. Pet. App. 19a-22a.

REASONS FOR GRANTING THE PETITION

This case raises procedural fairness issues of exceptional importance. Congress established federal court jurisdiction based on diversity of citizenship in 1789 -- and has maintained it ever since -- because it wanted to provide out-of-state litigants with an impartial forum and feared that state courts tended to favor local citizens. It simultaneously established a right of removal from state court to federal court so that out-of-state defendants, not just out-of-state plaintiffs, would have access to a federal forum. This Court has long directed the lower federal courts to "'take such actions as will defeat attempts to wrongfully deprive parties entitled to sue in Federal courts of the protection of their rights in those tribunals.'" *Wecker v. National Enameling and Stamping Co.*,

204 U.S. 176, 182-83 (1907) (quoting *Alabama Great Southern Ry. Co. v. Thompson*, 200 U.S. 206, 218 (1906)). The federal appeals courts have carried out that directive by adopting strict "fraudulent joinder" rules that prevent plaintiffs from adding inappropriate parties to their suits as a means of destroying diversity and thereby preventing defendants from exercising their removal rights. The Fifth Circuit has now adopted a "common defense" exception that significantly narrows the scope of fraudulent joinder doctrine. Review by this Court is warranted to determine whether the "common defense" exception is faithful to that directive and whether it adequately protects out-of-state defendants' congressionally mandated right to secure an impartial forum by removing diversity cases to federal court.

Review is particularly warranted because the Fifth Circuit's "common defense" exception is so clearly in conflict with decisions from other circuits. The Fifth Circuit is in *direct* conflict with the Ninth Circuit on this issue, a fact acknowledged by the Fifth Circuit in its *Smallwood* decision. In their numerous decisions discussing fraudulent joinder doctrine, other federal appeals courts have explained the doctrine in much the same manner as did Judge Jolly in his *Smallwood* dissent, without ever so much as hinting that fraudulent joinder doctrine is inapplicable in cases involving a "common defense." Moreover, nothing in this Court's decisions supports or even suggests *Smallwood*'s constricted view of fraudulent joinder.

Review is also warranted because the Fifth Circuit's rule, by denying an impartial federal forum to many vaccine manufacturers, could have a significantly adverse effect on public health. One of the principal reasons that Congress adopted the Vaccine Act was its fear that high litigation costs were driving vaccine manufacturers out of the market and

leading to product shortages.[6] Yet, the Fifth Circuit's rule threatens a further increase in vaccine manufacturers' already high litigation costs by providing tort claimants a mechanism that will allow them to keep much vaccine-related litigation in state court, the forum in which out-of-state vaccine manufacturers fear they are most likely to experience biased treatment.

I. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW CONFLICTS WITH OTHER APPEALS COURTS DECISIONS REGARDING THE SCOPE OF FRAUDULENT JOINDER DOCTRINE

Review of the decision below is warranted because it directly conflicts with a decision of the Ninth Circuit on an important issue of federal court procedure. Indeed, the Fifth Circuit has imposed a severe restriction on fraudulent joinder doctrine that has never previously been recognized in any federal appellate decision or any of the leading treatises on federal procedure.

The right of nonresident defendants to remove diversity jurisdiction cases from state to federal court is established by 28 U.S.C. § 1441. In determining whether diversity cases are removable, Congress has instructed courts to focus on the citizenship of only those defendants who have been "*properly* joined and served." 28 U.S.C. § 1441(b) (emphasis added). It is well accepted that a defendant is "improperly" or "fraudulently" joined if it has been included as a defendant for

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[6] Indeed, the nation has been experiencing a critical shortage of influenza vaccine for the past several months, a shortage attributed by many commentators at least in part to the uncertain litigation environment facing vaccine manufacturers.

the sole purpose of defeating any effort to remove the case to federal court. The Fifth Circuit in this case created a major exception to fraudulent joinder doctrine: a resident defendant will be deemed properly joined regardless how insubstantial the claims against him, if the basis for asserting that the claims are meritless provides a basis for asserting that the claims against the nonresident defendants are similarly baseless. Pet. App. 4a-5a.

In so holding, the decision below directly conflicts with the Ninth Circuit's decision in *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313 (9th Cir. 1998). *Ritchey* held that nondiverse defendants had been fraudulently joined, and thus that their presence did not preclude removal to federal court, because all claims against the nondiverse defendants were so clearly barred by the applicable statute of limitations. *Id.* at 1319-20. The court so held despite its full recognition that the statute of limitations also barred suit against the nonresident defendant that had invoked fraudulent joinder doctrine as its basis for removing the case to federal court:

> We recognize that it is, perhaps, slightly peculiar to speak of Dr. Dement and Stanford [the nondiverse defendants] as sham defendants because the statute of limitations bars a claim against them, when that would seem to lead to an argument that Upjohn itself is a sham defendant because the statute of limitations has also run against it. Nonetheless, the fact is that Ritchey did not state a cause of action against anyone, and his failure to state that cause of action against Dr. Dement and Stanford demonstrates beyond peradventure that they were sham defendants for purposes of removal.

Id. at 1320. In other words, the Ninth Circuit focused directly on the fact that all defendants shared a common defense, and

determined that that fact did not preclude the nonresident defendant from removing the case to federal court by invoking fraudulent joinder. The Fifth Circuit adopted its conflicting view with full recognition that the Ninth Circuit had reached a contrary result. *See Smallwood*, 385 F.3d at 575 n.21 (acknowledging conflict with *Ritchey*).

Moreover, the Fifth Circuit's "common defense" exception finds no support in other appeals courts' treatment of fraudulent joinder doctrine. Other circuits have routinely articulated a test for fraudulent joinder that is substantially similar to the Fifth Circuit's pre-*Smallwood* test: a resident defendant is deemed "fraudulently joined" -- and thus irrelevant in determining removability -- if there is no possibility that the plaintiff can recover from the resident defendant. *See Hartley v. CSX Transp., Inc.*, 187 F.3d 422 (4th Cir. 1999); *Jerome-Duncan, Inc. v. Auto-By-Tel, L.L.C.*, 176 F.3d 904 (6th Cir. 1999); *LeBlang Motors, Ltd. v. Subaru of Am., Inc.*, 148 F.3d 680 (7th Cir. 1998); *Filla v. Norfolk Southern Ry. Co.*, 336 F.3d 806 (8th Cir. 2003). Nothing in those courts' articulation of the test suggests that fraudulent joinder doctrine is inapplicable if all defendants share a common defense. Indeed, the opposite conclusion is much more logical: if fraudulent joinder depends on a showing that the plaintiff cannot possibly recover from the non-diverse defendant, then the existence of a common defense is irrelevant to the fraudulent joinder determination because the existence of a common defense does not make it any more or less likely that the plaintiff can recover from the non-diverse defendant.

The Fifth Circuit claimed support for its "common defense" rule in a Third Circuit decision. Pet. App. 4a (citing *Boyer v. Snap-on Tools Corp.*, 913 F.2d 108, 113 (3d Cir. 1990)). To the extent that *Boyer* supports the "common

defense" rule, it only deepens the split among the federal appeals courts. But the Fifth Circuit significantly overstated the extent to which *Boyer* supports its "common defense" rule. The Third Circuit's principal objection to the district court's invocation of fraudulent joinder doctrine was that the district court reached its conclusion – that the plaintiffs' claims against the resident defendants were without merit – only after delving deeply into factual bases for those claims. *Boyer*, 913 F.2d at 112.[7] The Third Circuit stated that if a court determines that claims asserted against the nondiverse defendant are "colorable," its inquiry should come to an end – the plaintiff has successfully refuted the fraudulent joinder claim without any need for the court to delve more deeply into the merits of those claims. *Id.* at 113.

The Fifth Circuit's reliance on *Chesapeake & Ohio Ry. Co. v. Cockrell,* 232 U.S. 146 (1914), is similarly misplaced. Petitioners explain at length why *Cockrell* is inapposite, so we will not repeat that explanation here. Suffice to say that *Cockrell*'s principal concern was in ensuring that a dispute over the propriety of a removal petition does not degenerate into a full-fledged trial on the merits. The basis for the assertion of fraudulent joinder in *Cockrell* was that the plaintiff's claim that he had been injured due to the negligence of the resident defendants was "false and untrue." The Court held that a general denial of the plaintiffs' claims was insufficient to establish fraudulent joinder, because resolution of the defendants' claim that there was no negligence "manifestly went to the merits of the action as an entirety" and

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[7] The court described the district court's inquiry as a "summary judgment type inquiry." *Id.*

thus could only be resolved in connection with a full-fledged trial, not at the removal stage. *Cockrell*, 232 U.S. at 153.[8]

Courts are no doubt well advised to conserve their resources by limiting the scope of any fraudulent joinder inquiry. As the Fifth Circuit recognized, a defendant making a fraudulent joinder claim faces a heavy burden of proving that there is "no possibility" of recovery against a resident defendant and that any such proof must be established in connection with "a summary process" that does not "entail substantial hearings." *Smallwood,* 385 F.3d at 574. But the Fifth Circuit erred in reading anything more into *Cockrell* than a desire to prevent trial-type proceedings in connection with removal petitions; at the very least, review is warranted to determine whether the Fifth Circuit properly relied on *Cockrell.*

The rule adopted by the Fifth Circuit has little to recommend it. As Judge Jolly pointed out in his *Smallwood* dissent, the "common defense" rule complicates a fraudulent joinder determination considerably, because judges in the Fifth Circuit must now examine the entire case to determine whether defenses available to the resident defendants also apply to the nonresident defendants. *Smallwood,* 385 F.3d at 578 (Jolly, J., dissenting). That determination will be made considerably

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[8] If the Fifth Circuit's interpretation of *Cockrell* were as self-evident as the Fifth Circuit suggests, then one could have expected commentators to have arrived at a similar conclusion. But as Judge Jolly pointed out in dissent, "Equally revealing of the novelty of the majority's position is that neither WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE nor MOORE'S FEDERAL PRACTICE -- the two most authoritative treatises on federal practice -- cite *Cockrell* as relating to such a theory as 'common defense' or, for that matter, even intimates that such a rule exists." *Smallwood,* 385 F.3d at 580 (Jolly, J., dissenting).

more complicated if the nonresident defendants choose to rely on some other defense; courts will then be placed in the unenviable position of attempting to determine whether an unasserted defense is nonetheless meritorious.[9]

Moreover, it makes little sense to allow a claim to go forward in a remanded proceeding if the trial court is convinced that the claim is utterly lacking in merit. As Petitioners point out, the courts are *unanimous* in rejecting one of Respondents' principal responses to the failure-to-exhaust-remedies defense: that exhaustion is not required because thimerosal is a "contaminant or adulterant" within the meaning of 42 U.S.C. § 300aa-33(5). Reply Brief 2-3. The Fifth Circuit did not dispute this unanimous consensus. Indeed, it recently characterized as "unremarkable" the proposition that thimerosal-related injuries, allegedly occurring as a result of a vaccine, are subject to the Vaccine Act's exhaustion requirements. *Moss v. Merck & Co.*, 381 F.3d 501, 504 (5th Cir. 2004). Yet, the Fifth Circuit held that the district court erred in dismissing Respondents' claims based on failure to exhaust remedies -- based solely on the Fifth Circuit's finding that *all* defendants could assert a failure-to-exhaust defense. Review is warranted to determine whether that approach to removal jurisdiction is consistent with either congressional intent or common sense.

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[9] In such circumstances, the parties are likely to reverse their normal arguments. The plaintiff would be tempted to admit that the defense raised on behalf of the resident defendants has considerable force when applied to the nonresident defendants, while the nonresident defendants asserting fraudulent joinder would be tempted to assert the opposite position.

II. REVIEW IS WARRANTED BECAUSE THROUGHOUT AMERICAN HISTORY THE RIGHT OF REMOVAL HAS PLAYED A VITAL ROLE IN ENSURING PROCEDURAL FAIRNESS TO OUT-OF-STATE LITIGANTS

Review is also warranted because of the important role that the right of removal has played in the civil justice system throughout our nation's history. Given the important role that the right to remove cases to federal courts has played in ensuring that out-of-state defendants have available to them an impartial judicial forum, the Court should carefully examine any efforts by the federal appeals courts to cut back on removal rights.

The need to protect out-of-state litigants from the biases of state courts was widely discussed at the time the Constitution was being drafted. For example, James Madison argued that "a strong prejudice may arise in some states, against the citizens of others, who may have claims against them." 3 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA, IN 1787 533 (2d ed. 1836). Similar, Alexander Hamilton argued that federal courts should be granted jurisdiction over cases between citizens of different states, because such a court was "likely to be impartial between the different states and their citizens, and which, owing its official existence to the union, will never be likely to feel any bias inauspicious to the principles on which it is founded." THE FEDERALIST NO. 80, at 403 (Alexander Hamilton) (Garry Wills ed., 1982). As ratified, the Constitution explicitly included within the "judicial Power" cases "between Citizens of different States." U.S. Const., Art. III, § 2.

The Judiciary Act of 1789 granted diversity jurisdiction to the federal courts. But those concerned about the problem of biased state courts realized that diversity jurisdiction could not by itself fully address the problem: it provided no protection to nonresident defendants sued in state court. Section 12 of the Judiciary Act addressed that latter concern by authorizing a nonresident defendant sued by a resident defendant in state court to remove the case to federal court. Judiciary Act of 1789, ch. 20, § 12, 1 Stat. 73, 79-80. The right of removal "has been in constant use ever since." *Tennessee v. Davis*, 100 U.S. 257, 265 (1880). This Court has long recognized that the right of removal was intended to grant defendants the same protections from local prejudice in state court that diversity jurisdiction grants to plaintiffs:

> The constitution of the United States was designed for the common and equal benefit of all the people of the United States. The judicial power was granted for the same benign and salutary purposes. It was not to be exercised exclusively for the benefit of parties who might be plaintiffs, and would elect the national forum, but also for the protection of defendants who might be entitled to try their rights, or assert their privileges, before the same forum.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat) 304, 348. (1816).

Congressional concern over state court bias has not decreased over time. Indeed, both the Senate Judiciary Committee and the House Judiciary Committee recently issued reports decrying the unwillingness of some state courts to provide basic fairness to out-of-state defendants in nationwide class actions and recommending that class action defendants be given greater rights to remove such cases to federal court on

the basis of diversity jurisdiction. S. Rep. 108-123, Senate Judiciary Committee, The Class Fairness Act of 2003, 108th Cong., 1st Session (2003) at 5-6, 11; H. Rep. 107-370, House Judiciary Committee, The Class Action Fairness Act of 2002, 107th Cong., 2d Sess. (2002) at 7, 8, 11.

Congress has also taken steps to ensure that procedures governing removal are uniform throughout the country. For example, 1948 and 1949 legislation established uniform time periods for the filing of removal petitions. *See generally Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999).

By cutting back on the right to remove to federal court cases filed in state courts in Louisiana, Mississippi, and Texas, the Fifth Circuit's decision undermines the uniformity of removal procedures that Congress sought to impose. Review should be granted to restore that uniformity, and also to examine whether – in light of Congress's long commitment to providing nonresident defendants with a federal forum – it really intended the severe curtailment of removal rights effected by the Fifth Circuit.

III. REVIEW IS WARRANTED BECAUSE THE DECISION BELOW COULD ADVERSELY AFFECT PUBLIC HEALTH

Review is also warranted because the Fifth Circuit's rule, by denying an impartial federal forum to many vaccine manufacturers, could have a significantly adverse effect on public health. One of the principal reasons that Congress adopted the Vaccine Act was its fear that high litigation costs were driving vaccine manufacturers out of the market and

leading to product shortages.[10] Yet, the Fifth Circuit's rule threatens a further increase in vaccine manufacturers' already high litigation costs by providing tort claimants a mechanism that will allow them to keep much vaccine-related litigation in state court, the forum in which out-of-state vaccine manufacturers fear they are most likely to experience biased treatment.

As then Chief Judge Breyer explained, "an important federal purpose" of the Vaccine Act was "to free manufacturers from the specter of large, uncertain tort liability, and thereby keep vaccine prices fairly low and keep manufacturers in the market." *Schafer v. American Cyanamid Co.*, 20 F.3d 1, 4 (1st Cir. 1994) (Breyer, C.J.). A 2002 General Accounting Office study indicated that recent childhood vaccine shortages are at least partially attributable to liability concerns and litigation defense cost. GAO, *Childhood Vaccines: Ensuring an Adequate Supply Poses Continuing Challenges* (Sept. 2002). In a recent speech, Senate Majority Leader Bill Frist, a practicing doctor, noted the importance of developing new vaccines to guard against the growing threat of bioterrorism but warned that the threat of manufacturer liability has hindered that development effort. 148 Cong. Rec. S11169-01, S11176-S11178.

The Fifth Circuit's decision has served to stoke the litigation liability concerns of vaccine manufacturers. It makes it much more difficult for nationwide manufacturers to remove lawsuits to federal court when they are sued in state courts by citizens of that state. Such increased liability concerns will

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[10] Indeed, the nation has been experiencing a critical shortage of influenza vaccine for the past several months, a shortage attributed by many commentators at least in part to the uncertain litigation environment facing vaccine manufacturers.

cause manufacturers to be even more reluctant to remain in the vaccine manufacturing field, thereby exacerbating current vaccine shortages. In light of the significant public health and national security concerns raised by that decision, review is warranted to determine whether Congress really intended to limit removal rights along the lines outlined by the Fifth Circuit.

CONCLUSION

The Washington Legal Foundation respectfully requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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